IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	§ CASE NO. 23-90020-11
	§ JOINTLY ADMINISTERED
	§ HOUSTON, TEXAS
SERTA SIMMONS BEDDING, LLC,	§ MONDAY,
ET AL,	§ MAY 15, 2023
DEBTORS.	§ 9:30 A.M. TO 12:24 P.M.
**********	**********
SERTA SIMMONS BEDDING, LLC,	§ CASE NO. 23-9001-ADV
ET AL,	§ JOINTLY ADMINISTERED
	§ HOUSTON, TEXAS
VERSUS	§ MONDAY,
	§ MAY 15, 2023
AG CENTRE STREET PARTNERSHIP,	§
ET AL	§ 9:30 A.M. TO 12:24 P.M.

CONFIRMATION DAY ONE - MORNING SESSION (VIA ZOOM)

BEFORE THE HONORABLE DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

(Recorded via CourtSpeak. No log notes.)

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(Please also see Electronic Appearances.)

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WITNESSES:	Direct	Cross	Redirect	Recross	VOIR DIRE

(None called in this morning segment.)

EXHIBITS:	Marked	Offered	Admitted

(Exhibits pre-admitted.)

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HOUSTON, TEXAS; MONDAY, MAY 15, 2023; 9:30 A.M.

THE COURT: May 15, 2023, this is the docket for Houston, Texas.

On the 9:30 docket this morning, we have joint proceedings in the main bankruptcy case, Case Number 23-90020, Serta Simmons Bedding, LLC, et al, as well as the adversary proceeding, 23-9001.

Folks, don't forget to record your electronic appearance today.

If, for some reason, you're appearing in one case, but not the other, enter your appearance in the main case and just note by your name if you only want your appearance entered in, say, the adversary or just the main case. We'll pick that up and -- but we will record the notice of appearance in the main bankruptcy proceeding.

First time that you do step up and speak, if you would, please state your name and who you represent. That really does serve as a good point of reference for what we all know will be a long transcript this week.

(Laughter)

THE COURT: We are recording using CourtSpeak. What we'll do is we'll break up both the CourtSpeak, as well as the transcript when we break for lunch, so that we can go ahead, get that downloaded, so you'll see that trickling in, at least the CourtSpeak in the afternoon.

The court reporting, all I can do is upload it, I can't make anything happen beyond that.

For the folks who are in the courtroom, since we do have approximately 100 people who are watching by video, when you speak -- and I know it's going to be hard -- but if you would, please come to the lectern to be heard. That is the only place where there is a camera, and I want you to both be seen and be heard.

And with that, Mr. Schrock, good morning.

MR. SCHROCK: Good morning, Your Honor. Ray Schrock, Weil, Gotshal & Manges, counsel for the Debtors.

THE COURT: All right. There were a number of things filed this morning. I was not able to match up all of the objection withdrawals. It seems to me they were -- at least just looking at the titles, those were the easy ones --

MR. SCHROCK: Yes.

THE COURT: -- that we all knew you would fix.

Do you want to take just a couple of minutes and sort of tell me where you think we stand going forward today?

MR. SCHROCK: Sure, Your Honor.

And I did have a -- I have a quick deck to walk through, and we had a --

THE COURT: Okay.

MR. SCHROCK: We have a slide, actually, that outlines it.

THE COURT: Okay.

MR. SCHROCK: So I think we've got 11 formal objections that have been filed to confirmation of the plan, and there's 13 other parties that have filed limited objections to confirmation, solely based on disputed cures. We've been able to kick all the cure issues, per normal.

We have four of the plan objections and all the informal comments that have been resolved consensually through the addition of clarifying agreed-upon language in the proposed confirmation order.

THE COURT: Ah.

MR. SCHROCK: So the remaining objections are the non-PTL Lenders, which is Docket Number 824. This is for confirmation, as well as Docket Number 825, that's the LCM joinder.

We have the Citadel objection at Docket Number 810;

The United States Trustee at Docket Number 820; and

Then we have a few litigation counterparties that have filed objections:

Cameron Thierry at Docket Number 826;

The minority licensees at Docket Number 827;

And then Alan and Ruth Humphries at Docket No. 829.

And so that's everything.

But what I was proposing to do, Your Honor, is just go through a few comments to open up, hand it over to

Mr. Lender, who's going to handle the majority of the legwork on making the opening comments, and then turn it over to the PTL Lenders to speak.

THE COURT: No, absolutely, and thank you.

I saw the deck. I didn't -- I was rushing to get it printed, so I have a copy. I have not seen it. And I do see that you have plan objection slide, so my apologies --

MR. SCHROCK: Okay.

THE COURT: -- for asking the question.

MR. SCHROCK: No, no worries, Judge.

THE COURT: Let me ask, just so that I know how to switch back and forth: Who is your control person for publishing documents?

(Participants confer)

MR. SCHROCK: Jorge is -- what is it?

MR. MARTORELL: Martorell.

MR. SCHROCK: Martorell.

THE COURT: I'm sorry. I just couldn't hear.

MR. MARTORELL: It's Jorge and it's Martorell. Do you want me to spell that for you, Judge?

THE COURT: No. So, when you typed in your name --

MR. MARTORELL: Uh-huh.

THE COURT: How did you do that because I was looking for the G, it's not there.

MR. MARTORELL: Oh, I'm sorry. It's Jorge.

THE COURT: All right. Oh, got it. Okay. There it is.

(Court and court personnel confer)

THE COURT: Ah, so you are simply -- I misunderstood. So you're going to do the publishing only in the courtroom, not over GoToMeeting?

MR. MARTORELL: It -- whatever the parties -- whatever my side wants. I can do it only in the courtroom or I can --

THE COURT: I'm just asking because I have to hit a different button.

MR. MARTORELL: Right, I understand. So --

THE COURT: Okay.

MR. MARTORELL: -- do straight up in the courtroom?

UNIDENTIFIED: I think -- well, we're fine displaying it everywhere, right?

MR. SCHROCK: Yes. And is the issue that he's not logged in to GoToMeeting? Is that --

THE COURT: I did not --

MR. MARTORELL: No, no, no. I'm on. It just depends on how the Judge is going to project us, whether we're going to do it outside of the courtroom, so everyone can see, or just in the courtroom?

MR. SCHROCK: No, we're going to do it for everywhere.

MR. MARTORELL: Okay. GoToMeeting then it is.

THE COURT: Okay.

(Pause in proceedings)

THE COURT: And things are -- I'm having a hard time, people are moving in and out. Could you just raise your hand, and I will --

MR. MARTORELL: Sure.

THE COURT: -- that will help me.

MR. MARTORELL: Sure. Can you see me?

THE COURT: Yes.

(Court and court personnel confer)

THE COURT: Let me ask you and this will be easier. Can you -- oh, you don't have a camera. I can try to do it this way.

MR. MARTORELL: I was on the screen. I'm on the third row to the bottom.

THE COURT: Now I see you. Thank you. We will get this. Now I know. All right.

MR. MARTORELL: Okay.

THE COURT: Mr. Schrock, my apologies.

MR. SCHROCK: No, no worries.

MR. MARTORELL: No worries.

THE COURT: It's sad when I'm the tech guy.

(Laughter)

MR. MARTORELL: We are sharing.

MR. SCHROCK: Okay. Perfect. All right. Let's -- do you want to go ahead and just put --

MR. MARTORELL: (Indiscernible).

MR. SCHROCK: Oh, okay. So, if I do it --

MR. MARTORELL: (Indiscernible) yeah, you can use that.

MR. SCHROCK: All right. We got it. Okay, Judge. Here we go.

It looks like we're going to the mattresses on this one.

(Laughter)

MR. SCHROCK: In all seriousness, we're pleased to be before the Court today to seek confirmation of the Debtors' Plan of Reorganization.

There is also the declaratory judgment action, which, as you well know, is inextricably intertwined with the plan.

Debtors are standing at the precipice of confirmation and emergence from Chapter 11. This has been, you know, the better part of a year putting this in the works. And I'm going to address confirmation issues and what some of the evidence will show, some of the trial scheduling. David Lender will follow. So, really, I'm going to try and give context, settlement with the Committee, overview of plan voting, trial calendar, briefly on plan treatment, and then a

short discussion around the objections and kind of what the evidence will show, we believe.

Your Honor, I'd be remiss if I didn't put everyone's attention on the fact that, you know, despite all of the legal arguments that are going to be made here, we have a company that has more than 3,000 employees, that is fighting to reorganize, it's fighting to survive. It is very much, I know, on Your Honor's mind. It is very much on our -- everybody on the Debtors' team's mind, the board of directors, the management team.

This is not a company that can afford to stay in Chapter 11 and simply see what happens. They're in an extremely competitive industry. They need to get back to the business of doing what they do best. And as everybody knows, the landscape gets more competitive all the time.

This plan has the overwhelming support of the Debtors' stakeholders and incorporates settlements with the consenting creditors, the equity holders, as well as a global settlement with the Creditors Committee.

The Creditors Committee global settlement represents a compromise among the Debtors, the Creditors Committee, as well as the RSA parties, the requisite consenting creditors. It is a resolution of all disputes asserted by the Creditors Committee.

They've negotiated for enhanced treatment for

general unsecured creditors under the plan; namely -- and this is what some of the changes were that were filed:

Class 6A now receives full payment the later of 60 days after the effective date or the date of execution of a trade agreement.

The 6B holders receive interest in a trust which will be funded by $5.75 million. There's a creation of a trust. The Creditors Committee and its members are included exculpated parties and release parties.

But very importantly, you know, this plan is really structured around what really needs to happen, which is a resolution of the litigation that has been an overhang to this company over the last three years, as well as a de-leveraging of the company's capital structure by over $1.6 billion.

So let's just take a quick look at the voting results, and this will be shown in the evidence.

The F-L-O -- FLFO claims are -- there's only one party that's objecting; 90 -- you know, almost 99 percent in number accepting.

The FLSO, also an accepting class, 98 percent in number accepting.

The non-PTL claims, not surprisingly, they voted to reject the plan, so we'll be dealing with them on cramdown.

Ongoing general unsecured claims that are getting paid, those that voted to accept, and then other general

unsecured claims that voted to reject. So we will be dealing with the cramdown standards on that particular class.

However, as we did note, the Unsecured Creditors Committee has reached a compromise and, you know, is now supporting the plan.

THE COURT: Terrific.

MR. SCHROCK: Let's talk a little bit about the calendar, which could be aspirational. We'll see how we can go, but this is what we've agreed to.

And on the left, in the boxes, this is, you know, what the evidence is that's going to be covered by that witness during live testimony. And then, on the right, there is the -- what's going to be covered by Declaration.

So we were able to work with the objecting parties and, where it didn't look like something was going to be a contested issue, we are planning on -- we filed Declarations. We're going to move to admit those probably, you know, at the close of the Debtors' case because we just filed them and we're giving them a couple of days to look at them.

But as you can see, on Monday, after opening statements, the Debtors' investment banker Roopesh Shah, who is in the courtroom with us today, will be testifying as to the 2020 transaction. Valuation and exit financing are going to be handled by Declaration.

We also have Mr. Ken Prince from Advent. He will be

discussing the DQ list issues of -- that have been the subject of litigation.

On day two, we have continued witness testimony from day one, to the extent necessary. And I understand we're moving forward in the afternoon.

Harvey Tepner, a member of our Finance Committee, is going to hit governance, good faith, settlements, and exculpations. I expect, you know, he'll have a rather lengthy direct and cross.

And then the PTL Lenders are putting on Mr. Karn Chopra of Centerview and Andrew Sveen from Eaton Vance on the 2020 transaction.

Day three, we'll have Mr. Bartholin from UBS. It will be any other PTL Lender witnesses. And then we have the Debtors' CFO John Linker, who will be hitting good faith and other 1129 requirements; Mr. Talarico, who will be hitting the liquidation analysis by Declaration; and Ms. Young, who will be handling the voting and tabulation.

To the extent we need more time, then we're going to have day four on Thursday. And from what I understand, I think we have a full day on Thursday, and then Friday, if needed.

We've currently got time scheduled with Your Honor for May 25th for closing arguments, and we'll be working on proposed Findings of Fact and Conclusions of Law in the

meantime.

On the right, we have what we're going to try and handle by Declaration. Now, to the extent that parties have cross and things come up as we move forward, we'll just have to adjust and, you know, there could be a need for redirect.

THE COURT: Okay.

MR. SCHROCK: Just briefly on the plan treatment, just to keep this all in mind, the FLSO claims are getting 100 percent of the new common interest on the effective date, less any common interest to Class 5 and sort of dilution, pursuant to the management incentive plan. They're also going to get aggregate term loans, less amounts distributed on account of Class 3.

Because Class 5 voted to reject the plan, they're getting one percent of the new common interest issued on the effective date, subject to any dilution by new common interested distributed pursuant to MIP.

Ongoing general unsecured claims we already talked about.

Other general unsecured claims, we already spoke about.

The rest of these are not really contested issues, but there's an absolute priority objection that I'll hit, you know, at the conclusion of my remarks.

THE COURT: Okay.

MR. SCHROCK: On the plan objection front -- and we already previewed this -- these were the objecting parties. These are, you know, what we're going to be dealing with. But I would be remiss, you know, if we didn't focus on a couple of these on the next slide.

The -- there's a -- the non-PTL Lenders object to the plan on the grounds that the PTL credit agreement should be classified as a -- an un -- a con -- an unclassified, contingent reimbursement or contribution claim regarding the indemnity. That's what they're focused on is the indemnity portion of that claim.

And Your Honor, I really think that, you know, as we move through this litigation and when we go through the evidence, you know, it's pretty clear, at least to us, what the real game plan is here. The game plan is: Do everything possible to try and sever the issues associated with the adversary and the plan, so that on appeal, if there's a lucky, you know, strike and they hit something, that we're not back in front of this Court. That's the game, that's the strategy.

I think that the indemnity claim, there's no doubt that weaving it into a comprehensive settlement, part of that settlement no one would agree to equitize their claims without an indemnity.

THE COURT: Right. So I assume that this is simply going to be part of the presentation and I'm going to see --

MR. SCHROCK: Yes.

THE COURT: -- evidence regarding the Debtors' business judgment as to why it decided to go down this path, right?

MR. SCHROCK: Absolutely, Your Honor. That's what we're going to show.

THE COURT: All right.

MR. SCHROCK: The absolute priority rule was regarding the Debtors' equity sponsor. That, of course, not surprisingly, we take great issue with that. There's substantial new value that's being provided by the equity sponsor, including support throughout the RSA. And the Debtors' ability to realize significant tax attributes, absent their cooperation, would not even be available, so we'll put testimony on to deal with that.

We did get an objection from Citadel and a lot of last minute, I would say, activity from them. They lobbed in an objection and then they put in a proposal for a new term loan over the weekend.

If you saw on the prior voting slide, they are the one lender that objected in the F-L-S-O -- F-O class. Their objection is primarily the indemnity should not be part of a go-forward term loan. So they asked the Debtor to ditch the RSA, go with their no -- new term loan, and that somehow we could still -- we could sever the indemnity, still keep the

RSA parties bound by the RSA, not re-solicit, move forward, and then I guess somehow negotiate for the revised capital structure documents still with the PTL Lenders and move forward.

The Finance Committee met last night. They respectfully declined to breach the RSA and move forward with that. The -- you know, the analysis on that is pretty straightforward:

One, we don't think the indemnity claim is severable as part of an overall settlement.

Two, we think that, if we did walk away from the RSA, we would still have to deal -- get a deal with the PTL Lenders. We don't have a way out of bankruptcy, we would be stuck in bankruptcy. We would have to formulate a new plan and we would be stuck in Chapter 11. It just didn't seem like a wise maneuver. There are other sort of reasons that we'll hit during the evidence.

But they also take issue that the plan is not feasible, given the potential impact of the indemnity claim. We disagree. We don't think there will be any evidence to that effect.

They said that the indemnity claim should be subordinated. We don't think that that's correct as a matter of law.

And that allowance of the indemnity claim revoke --

results in differential treatment. That is also incorrect. The indemnity is available to all of the lenders. And I believe, even in, you know, the recent case that was filed with a similar structure envisioned has an indemnity, as the evidence will show.

The U.S. Trustee also lobbed in an objection on the exculpations. I don't think that's going to be the subject of musk evidence -- much evidence, but we will be dealing with that during closing arguments.

THE COURT: All right. But it seems to me, on that one, is you can perhaps tweak your evidence, make some additional findings, and it will solve Mr. Duran's policy problem and also get you what you need.

MR. SCHROCK: And Your Honor, yes, I didn't want to indicate that we're not dealing -- Mr. Tepner is going to be putting in some evidence --

THE COURT: Right.

MR. SCHROCK: -- that we hope will solve that objection.

THE COURT: I got it.

MR. SCHROCK: Okay. So, Your Honor, that's it, in terms of my comments. I'm happy to answer any questions that you might have. And otherwise, I can turn it over to Mr. Lender.

THE COURT: Sure. Spend just a moment on the

remaining litigation claim objections, if you would, because I'm not sure I really understood them.

MR. SCHROCK: Sure, Your Honor. And actually, I'm going to turn that over to Mr. Welch for just a moment --

THE COURT: Of course.

MR. SCHROCK: -- just to give you --

THE COURT: Of course.

MR. SCHROCK: -- just to give you a line on that.

THE COURT: Certainly. Thank you.

(Participants confer)

THE COURT: And folks in the back, I'm trying to find some more chairs. As -- if they start bringing them in, just grab one even if it's down one side of the aisle or across the back. But we're looking for some additional chairs. I don't want you folks to have to stand.

Mr. Welch, my apologies.

MR. WELCH: For the Record, Alexander Welch, Weil Gotshal, for the Debtors.

Your Honor, just with respect to the litigation claims, we're in continued discussions with their counsel.

THE COURT: Okay. So do they have bankruptcy counsel or litigation counsel?

MR. WELCH: They have -- minority licensees on the list have both.

THE COURT: Right. That one I understand.

MR. WELCH: Yeah. The Humphries have both.

THE COURT: Okay.

MR. WELCH: And Mr. Thierry, who I know you're familiar with, is going it alone.

THE COURT: Okay. All right.

MR. WELCH: But we'll continue to talk to them over the course of the week and see if we can get things resolved before we come on -- come before you on confirmation issues on Friday.

THE COURT: Surely, thank you. It just seems to me that, if everybody is looking at the Code in a very straightforward way, that one is just easy to fix.

MR. WELCH: We agree with Your Honor. And we've also been working with the Creditors Committee counsel to help on that, as well.

THE COURT: Certainly. Certainly. Thank you.

MR. WELCH: Thank you, Your Honor.

THE COURT: All right. Let me -- I'm sorry. Go ahead.

MR. SCHROCK: Oh --

THE COURT: Go ahead. Yes, sir.

MR. SCHROCK: Yes, Your Honor.

THE COURT: So let me just -- so is that sort of the -- that's sort of here's where we are?

MR. SCHROCK: That's where we are, Your Honor.

THE COURT: All right. Let me do this. Again, not opening statements. But anyone else just have an announcement they needed to make, so that they could then go on about the rest of their day, or are there any other comments and not opening statements? You'll get your opportunity. Just things that I need to hear before we get started.

(No verbal response)

THE COURT: Then opening statements it is. Ah, wait a minute.

So, folks -- and I'm sorry. There were a number of people that raised their hand on GoToMeeting. If you want to be heard and you're on the video, if you would give me a five star on your telephone and I'll get you unmuted.

All right. We have someone from Dallas, area code 214.

(No verbal response)

THE COURT: All right. We have someone -- I think 203 is Connecticut. Is that right?

UNIDENTIFIED: That's right.

THE COURT: All right.

MR. BOWMAN: I'm sorry, Your Honor.

THE COURT: Yes, sir. Mr. Bowman? I'm sorry. Is that you?

MR. BOWMAN: Yes, it is, Your Honor.

THE COURT: Good morning.

MR. BOWMAN: Can you hear me?

THE COURT: And loud and clear. Thank you, sir.

MR. BOWMAN: Yes. Yes, good morning, Your Honor.

I just wanted -- I just wanted to make sure that I didn't fall under the radar. I represent the State of Connecticut Department of Economic and Community Development.

Your Honor may have seen we filed a motion for an extension of time to file a confirmation objection. I just wanted to make clear that we were not listed as a creditor in Debtors' Schedules, and the State -- the Department of Economic and Community Development learned of this bankruptcy quite by happenstance.

THE COURT: Okay.

MR. BOWMAN: It came about when the Department of Labor in Connecticut received a notice in April again, tight notice, that Serta or SSBM manufacturing was closing its plan in Windsor Locks, Connecticut. And later in April, it came to the attention of the Department of Economic and Community Development, which provided an assistance loan to SSB Manufacturing in the amount of $5 million. And that required them to maintain a certain level of employment in the State in a certain period of time, which was not fulfilled.

And so for that reason, we expect to file a Proof of Claim in the amount of at least $5 million in the SSB Manufacturing case. And Serta Bedding was also a guarantor,

so we would have a claim against Serta Bedding, as well.

We certainly did not receive the notice required by the Bankruptcy Rule 25 notice of a confirmation hearing and the objection deadline. I, myself, just got involved in the case. I think the date of the -- I filed my *pro hac* motion, which Your Honor was kind enough to grant this morning.

So I think we're being generous in asking until the end of the day tomorrow to file objections. I am still trying to get up to speed on the case, which is quite involved, as I learned in the (indiscernible) from the presentation that Your Honor just heard.

Just an issue I'm having that I think the arbitrary nature of the recovery table, it seems to have shortchanged the SSB Manufacturing estate. I'm not sure -- I haven't seen any criteria by which those numbers were arrived at, and I just note that as an initial concern.

And so I -- with that, I would just appreciate Your Honor acting on that extension motion and giving us the -- obviously, you know (indiscernible) how you want to proceed, but that's what I have to say on that, Your Honor.

THE COURT: Understood. Mr. Bowman, when do you think, realistically, you're going to be able to file your objection? If we said by noon tomorrow, is that going to be enough time?

MR. BOWMAN: I would actually ask for the end of the

day tomorrow --

THE COURT: I know, but --

MR. BOWMAN: -- if Your Honor would --

THE COURT: So here's what I was trying to do. And I -- where are you, just geographically?

MR. BOWMAN: I'm -- right now, I'm in Bridgeport, Connecticut, Your Honor.

THE COURT: All right. What I would ask that you do is you get that objection on file by tomorrow at 4:00.

MR. BOWMAN: Okay. 4:00 Central Time?

THE COURT: 4:00 Central Time, yes, sir. Thank you for the clarification.

What I -- and what I'd like to be able to do is we have that, I didn't get a chance to see what it is. And then perhaps tomorrow, toward the end of the day, we can have a conversation about how we want to deal with it, whether or not you intend to seek to introduce any evidence, whether it's argument, and also to give the Debtors' team an opportunity to sit and talk to you about whatever issues that are set forth in the objection.

Does that make sense?

MR. BOWMAN: It does, Your Honor, and I appreciate the accommodation.

THE COURT: Certainly.

So, if I could ask you -- and I know you have other

things to do. You may decide you're going to listen to all of this. But I would ask that you be on the video, sort of, you know, say, from -- I don't know -- mid-afternoon, at least have it on in your office, sort of mid-afternoon forward tomorrow.

MR. BOWMAN: Oh, absolutely, Your Honor.

THE COURT: Okay.

MR. BOWMAN: Not a problem.

THE COURT: All right. Thank you.

Mr. Bowman, anything else --

MR. BOWMAN: Okay.

THE COURT: -- today?

MR. BOWMAN: No. No, Your Honor. Thank you.

THE COURT: All right. Thank you.

Mr. Ralston, then were you the -- were you the 214 number?

MR. RALSTON: I was, Your Honor. Sorry, I was on mute when I was trying to speak with you. Yes. And Your Honor, I represent certain minority licensees, their confirmation objection.

I think I understood Mr. Welch to say that the Court would -- if we don't resolve this matter in the course of the week, that the Court would be taking up the objection -- which I believe is just legal argument. I don't believe the thing -- we put together some exhibits. I don't think that they're

-- you know, most of which are Proofs of Claim that are of record and other exhibit being the Restructuring Agreement between certain of the Debtors and my clients. So I -- so, if we don't resolve things, if I understand Mr. Welch, we will be taking that up on Friday.

And I only say that, Your Honor, because this is a lengthy proceeding and I don't know if my client is going to pay my way through sitting in for the entirety of this week.

(Laughter)

THE COURT: And I'm sure it's a -- I'm sure it's actually beneath your market worth.

(Laughter)

MR. RALSTON: It's a very reasonable rate, nonetheless, Your Honor. I am very sensitive to my fees.

THE COURT: Okay. Mr. Welch.

MR. WELCH: Thank you, Your Honor. Alexander Welch, Weil Gotshal, for the Debtors.

So the schedule, we're a little bit at the mercy of the progress of this week. Based on how it looks today, it did look like we would be able to get to confirmation objection argument for Friday. I would hate to think that, if peace broke out today or tomorrow, however unlikely that may be, or maybe it is, that we would then all have to put pencils down until Friday to have those arguments.

THE COURT: Perfect sense. We'll all stay flexible.

Mr. Ralston, what I would -- are you going to -- are you going to come in and out of these proceedings. Is that the goal?

MR. RALSTON: I think that there may be me and some other attorneys representing my clients may be popping in and out. If Mr. Welch would just give us advance notice or me more advance notice, we can be -- I can be -- I'm fairly available this week. And if there's an issue, it should be very specific as to a time block, so I think I can make myself available at a reasonable -- during the week, if peace does break out between the -- and I'll say major litigants in this matter.

THE COURT: Makes perfect sense to me. It was exactly what I was going to ask. Mr. Welch is nodding in the affirmative. He'll just keep you updated with email, text, however it is you all are communicating. Okay?

MR. WELCH: Will do. Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. RALSTON: That's great, Your Honor. Thank you so much.

THE COURT: All right. Thank you, Mr. Ralston.

Anyone else before we get to opening statements?

(No verbal response)

THE COURT: All right. Opening statements it is.

MR. WELCH: Okay. Thanks, Your Honor.

THE COURT: Good morning.

MR. LENDER: David Lender for the Debtors, from Weil Gotshal.

OPENING STATEMENTS ON BEHALF OF THE DEBTORS

BY MR. LENDER: In late 2018, one of SSB's largest retail customers, Mattress Firm, filed for bankruptcy. The company's sales and profits had decreased over the previous year and it was significantly over-leveraged.

In mid-2019, the company hired Evercore to assist them in finding ways to reduce their debt and interest expense, so as to position the company for a better future.

The company also took several -- undertook several key initiatives to try to improve its business, including hiring new key executives, launching new direct-to-consumer websites, and launching new product lines.

Unfortunately for the company, the COVID pandemic hit the United States in March 2020, significantly impacting its business. Hotels and retail stores were shut down and the company had to close a number of its manufacturing plants. SSB's sales plummeted and the company forecast significant sales drops throughout the rest of 2020. As a result, the company had to shift its near-term focus to exploring various alternatives to raise liquidity, in addition to reducing its debt burden.

You will hear, when Evercore's Senior

Manager/Director Roopesh Shah testifies that the company -- of the company did not obtain additional liquidity and restructure its debt, it likely would have been forced into bankruptcy back in 2020.

Defendants claim the 2020 transaction was not permitted under the credit agreements and sought to block that transaction back in 2020, but failed. They have revived their argument here, which the Court rejected in part, holding that the transaction constituted an open market purchase and granting summary judgment to the company on that issue. What remains is Defendants' claim that the transaction violated the implied covenant of good faith and fair dealing.

Defendants argue that the company and the PTL Lenders executed the 2020 transaction in secret and in bad faith to harm the nonparticipating lenders and deprive them of the fruits of the contract. The evidence will show that nothing could be further from the truth. SSB did the transaction, not to harm any lenders, but because it was facing an existential threat and was trying to save the company.

Defendants are sophisticated lenders. They bought into SSB's debt knowing it was subject to the credit agreements, which did not include anti-subordination as a sacred right and allowed a majority of lenders to amend its terms.

As you can see from this chart included in a June 2020 presentation to the Independent Finance Committee, Angelo Gordon and Gamut, who is part of the Angelo Gordon group, started purchasing SSB debt in 2019 at a discount, and continued to acquire larger positions as the company's debt traded down due to its financial troubles. Apollo also attempted to purchase SSB debt in March of 2020, again, at a significant discount, which it was not permitted to do. This is the subject of our disqualification claim that Advent's Ken Prince will talk about when he testifies.

Angelo Gordon's internal documents revealed one of the reasons why it was purchasing a large position in SSB as its debt traded down because, as Angelo Gordon's Ryan Moffett (phonetic) revealed in an internal document dated in April of 2020, they would love to own the business if it files, given its value.

The LCM Defendants argue we should have done the transaction a different way or offered the transaction to all lenders, but they ignore that the credit agreement explicitly stated that we didn't have to offer the deal to all lenders since open market purchases can be done on a non prorata basis. As Your Honor knows, the implied covenant cannot be used to rewrite the parties' agreement. And by having different groups of lenders compete against each other, the company got the best deal available. The fact that LCM would

have preferred we did the transaction a different way does not mean we violated the implied covenant.

Defendants also complain that the company played favorites and only allowed certain lenders to participate in the additional available basket capacity remaining after the transaction was announced. The company used around $28 million of that capacity to purchase additional debt at a discount. This newly minted argument, not raised in prior litigations, shows how far Defendants will go to try to get some claim to stick.

You will recall during the summary judgment argument that Defendants argued that open market purchases are one-off transactions. That's exactly what the company did here in deciding which additional lenders to allow to participate in their remaining capacity. Yet, now Defendants argue that doing precisely what they claim we could do violates the implied covenant. The implied covenant is not some freestanding catchall claim that covers anything in business you don't agree with.

During this trial, we believe the evidence will show three things which prove that the company and the PTL Lenders acted in good faith and did not breach the implied covenant:

First, SSB entered into the 2020 transaction because it was in financial trouble and was trying to stave off bankruptcy, not to harm the Defendants.

Second, Defendant engaged in a good faith competitive process to find the best deal it could.

And third, SSB's Independent Finance Committee evaluated the various proposals and selected the best deal the company could get. And the market responded favorably as shown by the price of SSB's 1-L debt, which increased well above the pre-2020 transaction price. Engaging the market to get the best deal you can is the epitome of acting in good faith.

Unfortunately for the company, its looming debt maturities and the downturn of the mattress industry generally made its capital structure unsustainable, forcing the company to file for bankruptcy in January of 2023. But the evidence will show that the 2020 transaction actually worked and benefitted the company and the Defendants for some time.

Let me now walk through the three points in more detail and preview some of the evidence you will see during this case, which shows that SSB did not breach the implied covenant:

First, SSB entered into the 2020 transaction because it was in financial trouble and was trying to stave off bankruptcy, not to harm the Defendants. Evercore's Roopesh Shah will be our first witness and will testify and explain the serious risks facing the company after the COVID pandemic hit the United States, all but shutting down its business.

As you can see from this -- I'm just trying to get the next slide. Lost it. Some technical difficulties.

(Participants confer)

MR. LENDER: Oh, great.

(Participants confer)

MR. LENDER: Sorry. One second.

THE COURT: No, of course.

(Participants confer)

MR. LENDER: Great. Whoops.

(Participants confer)

MR. LENDER: Okay. Great.

As you can see from this company board document, in March 2020, SSB's board of managers established an Independent Finance Committee and appointed two independent managers to the board, Joan Hilson and Harvey Tepner. Mr. Tepner will testify in this case.

The board ultimately designated full decision-making authority to the Independent Committee concerning the approval, negotiation, and implementation of a transaction to structure -- to restructure SSB's debt or incur new financing.

Here are the minutes of the Independent Finance Committee dated March 31, 2020, and here is the situation overview that the board and its advisors discussed at the meeting:

"Following a strong start to the year, COVID-19 has

had a material impact on SSB's and its customers' performance. Current cash flow forecasts indicate the company may run out of liquidity as soon as early July, necessitating an evaluation of transaction alternatives to raise near-term liquidity."

Looking to save the company and avoid bankruptcy was the company's motivation, not to harm certain lenders.

This leads us to our second point, which is that SSB engaged in a good faith competitive process to find the best deal it could.

Starting in April 2020, the company was looking at several alternatives to find near-term liquidity, given its concerns that it could run out of money.

As you can see from the slide deck presented to the Finance Committee, the company looked at all kinds of options, including sale lease-backs, selling its interest in its China JV, and raising financing from third-party lenders. It also believed that existing lenders could be the most likely source of liquidity for a comprehensive transaction.

As a result, you will hear that, throughout April and May 2020, Evercore, on behalf of the company, solicited proposals from existing holders of SSB's debt and potential third-party lenders and negotiated with those parties, trying to get the best deal it could for the company. This was all done in good faith and in the open. It was not being done to

harm one group of lenders or to favor one group over another.

Evercore's Roopesh Shah explained this to the Independent Finance Committee at its meeting of April 10, 2020. As you can see, Mr. Shah noted the object to the engagement process was to obtain multiple proposals for any transaction and enable a competitive process to obtain the best terms available to the company.

Here is an internal Evercore email identifying some of the parties Evercore reached out to concerning a potential transaction. This included several of SSB's existing lenders, including Oaktree, Gamut, TSSP, and Angelo Gordon, and it also included several third parties, including HPS, Fortress, Centerbridge, Blue Torch, Pinko (phonetic), and Silver Point.

Now, at the time, Evercore was discussing an IP co-financing transaction with these potential lenders. As Mr. Shah will explain when he testifies how an IP co-transaction works is that you form a new company, move certain of the company's assets, including its valuable IP, into that new company and then you use those assets as the collateral for the debt held in the new company by the participating lenders for their sole benefit.

And then if there's a default, the participating lenders alone are able to foreclose on that collateral that supported the loans and get repaid.

Now at this point in time, in early April 2020, the

lenders represented by Centerview and Gibson Dunn, who ultimately consummated the 2020 transaction with Serta, had not even made a proposal.

However, you will hear that when these lenders got wind of the IP code transaction that the company was discussing with potential lenders, they got involved and made a counterproposal that they believe would be better for the company and not based on what it's lawyer's refer to in an April 24th 2020 letter to Mr. Schrock as a predatory pricing structure and on onerous terms.

Moving forward in time, here are the minutes of a May 22, 2020 meeting of he Independent Finance Committee that you will see during this trial. Slide three from the board deck summarizes the different outreach done by Evercore and the pages that follow summarize the different terms Evercore was negotiating with various lenders.

As you can see among others, Evercore was negotiating with Angelo Gordon Group, Barrens, Fortress and TPG, and Blue Torch Capital Oaktree and Charles Bank.

This slide how much of the 1-L lenders Evercore was negotiating with. As you can see, those lenders held nearly 1.4 billion of the first lien debt, representing more than 70 percent of the debt. So the idea that this was somehow being done by the company in secret is ludicrous. The company literally approached 70 percent of the existing market to try

to cut the best deal that it could.

Looking at the Angelo Gordon proposal, you can see how similar it is to the 2020 transaction that they're now challenging. It had both a $200 million new money component and an exchange component whereby $100 million of existing debt would be exchanged at an exchange rate of 85 percent.

They also proposed exchanging an additional $493 million of existing 1-L debt at 85 percent and $42 million of existing 2-L debt at 40 percent. The structure was different than the 2020 transaction in that the Angelo Gordon Group proposal involved the IP Code transaction that I mentioned a moment ago. You can see that they proposed forming a new entity and then certain valuable assets of SSB would be transferred into that new company to serve as collateral for the new loan.

But to be clear, the Angelo Gordon Group's proposal had the exact same practical effect as the 2020 transaction they are now challenging. In both proposals, the parties were providing $200 million in new money and exchanging their existing debt for new debt at a discount.

In both cases, if there was a default certain lenders would be favored over other lenders. In the case of the Angelo Gordon Group proposal, in the event of default they would be able to foreclose on collateral that was made only available to them so they would have payment priority over the

other non-participating lenders in terms of that collateral.

In the case of the 2020 transaction, a new -- the new debt had superpriority status, but no collateral was stripped away. In fact, additional collateral was added for the benefit of all lenders.

Angelo Gordon also knows that its claim that the company somehow breached the implied covenant in a manner by which it used $28 million of additional debt capacity to acquire 1-L and 2-L debt at a discount after the transaction was announced, has no merit.

Here's a debt presented by Angelo Gordon to the company back in March of 2020 when they first disclosed the details of their proposed IP code transaction.

You can see that it involves a new money piece and a debt-for-debt exchange piece. Just like the 2020 transaction. And look at what they propose in the last bullet. "Company uses excess debt proceeds to opportunistic purchase 1-L and 2-L term loans in the open market for subsequent transactions."

So Angelo Gordon was proposing that after SSB did the debt-for-debt exchange with them, the company could go into the open market and opportunistically purchase additional debt.

This is exactly what the company did after it announced the transaction, which Defendants now claim somehow

also violated the implied covenant of good faith and fair dealing.

And in fact, Your Honor, the evidence will show that the company didn't just randomly decide who could participate and who could not. After announcing the 2020 transaction, several lenders reached out to try to get in on the deal.

As shown in this slide presented to the Finance Committee at the June 20, 2020 meeting, $218 million of 1-L debt and $105 million of 2-L debt reached out to try to get on the deal. Notably, LCM never reached out. They just went straight to litigation.

The company only limited remaining capacity. So it couldn't let everyone in to the deal that asked. But as you can see from the slide, they were clear business rationales for every single lender the company added, which was all approved by the Independent Finance Committee.

It's also interesting to see why Angelo Gordon thought they could do an IP code transaction, which would have benefited a select group of lenders, including them over others, undermining the very equal treatment they claim is paramount.

Here is an internal Angelo Gordon debt concerning their March 2020 proposal. And look what they said. It's because Angelo Gordon believed they could exploit weak credit documents to propose a solution to the company that favored a

certain set of lenders over others.

Let me now just turn briefly to the third point, which is that the Independent Finance Committee evaluated the various proposals and selected the best deal the company could get.

You'll hear that as the negotiations proceeded, it eventually came down to the PJT Angelo Gordon Group and the Centerview Group. Harvey Tepner, a member of the Independent Finance Committee, will explain when he testifies that after reviewing both proposals, the Committee decided to go with the Centerview proposal because it was a better deal for the company.

This slide summarizes some of those benefits, including that the Centerview proposal resulted in less debt and interest expense for the company. And did not strip away any collateral.

The evidence will also show that the 2020 transaction worked and the market responded favorably. Here is a demonstrative tracking the price of SSB 1-L debt.

After initially dropping in price, SSB's debt rebounded and exceeded the pre-transaction price. In fact, the 1-L debt traded as high as 79, nearly doubled the pre-transaction price before it began to fall more than a year later due to the negative market trends and because Defendants could not refinance their debt -- and because the company

could not refinance their debt.

Defendant's bought into the debt knowing full well its terms and anti-subordination was not a sacred right and amendments were allowed on majority consent of the lenders.

The 2020 transaction clearly benefited the company. Without it, the company likely would have been fored to file for bankruptcy back in 2020. And the market responded favorably.

Defendants received the fruits of the bargain, significant interest payments for several years. Defendants could have sold their position as the debt price soared, but they chose not to. That was their decision, not ours.

Ultimately now, due to the market, the company cannot refinance its debt and was forced to file for bankruptcy. But this doesn't render the 2020 transaction to be one taken in bad faith.

And so we believe the evidence will show that Defendant's claims has no merit and that the company and the PTL Lenders acted in good faith.

At the conclusion of the hearing, we're going to ask that you enter judgment in favor of the company and the PTL Lenders holding that the 2020 transaction did not breach the implied covenant of good faith and fair dealing. And we're also going to ask that you hold that Apollo was a disqualified entity and not permitted to trade in SSB's debt.

Thank you, Your Honor. With that, I both turn it over to my colleague, Mr. Costna (phonetic).

THE COURT: All right. Thank you.

(Pause in the proceedings.)

MR. COSTNA: Good morning, Your Honor.

THE COURT: Good morning, Mr. Costa.

MR. COSTNA: I think we might need to switch to the center. It's Mr. Herndon, Tim Herndon.

(Pause in the proceedings.)

THE COURT: He'd be on as SH?

MR. HERNDON: I'm sorry.

THE COURT: How did you log on?

MR. HERNDON: Tim Herndon.

THE COURT: Oh, Tim Herdon, my apologies.

(Pause in the proceedings.)

THE COURT: People list here. All right, Mr. Herndon, you should have control.

OPENING STATEMENT ON BEHALFOF THE PRIORITY LENDERS

BY MR. COSTA: Gregg Costa, Your Honor, from Gibson Dunn on behalf of the Priority Lenders.

Two pillars of our commercial law will decide this trial. The first is that businesses can rely on the words of the contracts that they sign.

The second is that businesses have a duty to their investors to pursue profit and protect against loss.

Both of these principals aren't just pillars of our commercial law, they're pillars of our entire economic system. And the evidence you're going to see and hear over the next week will show that the Priority Lenders' conduct was consistent with both of these bedrock principals.

They executed a transaction in 2020 that you've already held was allowed under the plain words of the credit agreement. And the reason they entered into that transaction was to defend against the serious downside risk posed to their investors by a drop down proposal that would have wiped away the critical collateral backing up loans.

For both of those reasons, the implied covenant claim will fail after you've heard the testimony this week.

I'll start with what the evidence is going to show on the first controlling principal. That businesses can rely on the words of the contracts that they sign.

The implied covenant doctrine doesn't override what the parties agree to in the words of a contract. Just last month, the New York Court of Appeals recognized that the implied covenant is a limited doctrine. It doesn't allow a part to come in and insert new terms that they wish they had negotiated when they entered into the contract.

As the New York Court said last month, "The implied covenant must arise from the contract itself." But what you're going to hear from the Defense is an attempt to

re-write the contract and to undo this Court's ruling that the credit agreement allowed this transaction.

The Defendants are going to present testimony that they -- it upset their expectations. They couldn't imagine something happening like the 2020 transaction.

But the expectations the parties should have under a credit agreement should be based on what those sophisticated parties wrote into the contract.

That's why borrowers, sponsors and lenders pay the best lawyers money can buy to draft, negotiate and review 147-page credit agreements.

And here's the other thing about this testimony about what a shock it was when the 2020 transaction happened. You're going to see that that's not what they were saying in the real world, back in 2020 when these events were unfolding.

Let's take a look at what some of the Defendants were saying in early 2020 before they were in the litigation posture. We'll start with Apollo.

March of 2020, Apollo described the credit documents as loose and recognized they allowed for an aggressive restructuring. Angelo Gordon was saying pretty much the same thing. That the credit documents were weak, could be exploited. And that there was a liability management possibility to delever via debt exchanges, which is exactly what ended up happening.

Angelo Gordon also -- can we have the slide to go -- recognized that the credit agreements stripped standard first lien protections. And they recognized the possibility of a liability management solution.

In fact, they were proposing their own. And specifically they recognized the exact mechanism that the 2020 transaction would end up using. Section 9.05(g) of the credit agreement.

Company uses a portion of debt proceeds to purchase loans at a discount to par and then cancel the loans under 9.05(g). So you'll see that the Defendant's own words show that the emergence of liability management solutions in 2020 didn't upset contractual expectations, it was the contractual expectations.

So this evidence is going to show that the implied covenant claim fails because the words the parties agreed to allow the 2020 transaction and set the parties' expectations for what might be possible. But if that doesn't defeat the claim on its own, any doubt will be removed by the second principal I started with.

Businesses have a duty to protect their investors from losses. Now New York law incorporates that principal into the law of good faith and fair dealing by recognizing that a party acts in good faith when it has a valid business justification.

And here, both the company and the Priority Lenders didn't just have valid business justifications, they had business imperatives entering into the 2020 transaction.

For the company, as you just heard Mr. Lender say, it was a matter of self-preservation. In the depths of the COVID pandemic, the deal infused new cash and allowed the company to delever its balance sheet to the tune of hundreds of millions of dollars.

And for our clients, the Priority Lenders, it was a matter of self defense. The deal was a defensive maneuver that prevented other lenders, including a number of the Defendants, from executing a drop down transaction with a very serious down side risk for their investors.

The law doesn't require lenders to just sit back and twiddle their thumbs when facing such a serious threat. To the contrary, lenders have a fiduciary duty to act and protect their investors.

Now the Priority Lenders would have acted in good faith even if they had unilaterally proposed the uptier transaction. Last time I checked, businesses were entitled to pursue their self interest.

And the law recognizes that by saying that good faith exists any time a company acts in pursuit of its self interest. There actually has to be malice that motivates the business decision instead of self interest.

But this is going to be an even easier case, Your Honor, because our clients didn't move first. A group lead by Angelo Gordon did. And in fact, our clients weren't excited about the prospect of selling their loans at a steep discount.

But they decided they had to do it to fend off the drop down transaction that was going to strip away this valuable collateral. Just like people, businesses act in good faith when motivated by self defense.

So I'm going to go through the timeline of events. And this chronology will show that our decision to enter into the 2020 transaction was a defensive maneuver to fend off the risk posed by the Angelo Gordon Group's drop down proposal.

From our clients' perspective, the story begins in the final quarter of 2019. Serta is facing economic difficulties. Mattress Firm has been in bankruptcy. Stores selling Serta mattresses have closed and revenue is down 10 percent over the prior year.

Angelo Gordon picked up on this and by early 2020 -- January of 2020, Angelo Gordon is already putting together a drop down proposal, the IP code transaction that Mr. Lender discussed.

Fast forward a couple of months to March of 2020. the pandemic hits the United States, stores are closed, the company as to furlough workers and it appoints a Finance Committee to begin looking at potential refinancings.

Now also in this time, early to mid-March when the market is down, both Gamut and Apollo are buying up Serta debt at very low prices. It's not until the end of March that a group of Priority Lenders starts to come together to coalesce into a group that our firm will represent and that wants to do something to help support the company during this time.

But by the end of March, right after the Finance Committee is put together, Angelo Gordon emails its proposal because it had already been in the works for a couple of months.

Now we go into April of 2023, the Priority Lenders continue to consider a proposal, but at this time our clients thought the company just wanted new money financing. So in late April, we submitted a proposal that would have injected new money into the company.

It was a new money superpriority financing, back stopped by the Priority Lenders in exchange for a back stop fee, but otherwise available to all first lien lenders. Nothing controversial about that proposal.

Meanwhile, Angelo Gordon, Apollo and Gamut are continuing to push forward with their drop down proposal. There's other proposals at this time. Berrings (phonetic) decides as a large lender that it's going to put together it's own drop down proposal to maximize it's upside.

And by late April rumors or circulating in the

industry about an aggressive drop down proposal.

Now at some point -- excuse me -- some point in May, the Priority Lender groups learns that in addition to a new money financing, the company is also interested in delevering its balance sheet and that the drop down proposal was going to be paired with a debt-for-debt exchange that would allow for that deleveraging.

So, rather than sit idly by while other lenders try to strip away this critical collateral, the Priority Lender group moved forward with a proposal that would be more favorable to the company than the drop down proposal.

So in May our clients and their advisors enter into NDAs with the lenders. Now our clients decided to include the debt exchange reluctantly. They had bought company debt at par. So selling in the 70s, which is the price people were walking about, was going to lock in losses, something our clients didn't want to do.

Now on the other hand, the Angelo Gordon proposal was a win-win for its side. It was going to give them structural priority on the new debt and because they had bought Serta debt at such a discount on the secondary market, they were going to achieve gains on the sale.

So why were the Priority Lenders willing to take a haircut on the 1-L debt and sell at a significant? Well, even though they were'nt excited about it, the fear of the drop

down transaction loomed large.

And you're going to see as we get into the nitty gritty of the negotiations into late May -- see if you can pull that up.

By late May and early June both groups are trading back and forth proposals with the company. And by June 4th, you're going to see that the company comes back with a counterproposal asking to buy back the debt at 74 cents.

And a lot of the lenders group thought that -- preferred lenders thought that was already too low. But you'll see emails, you'll hear testimony that they were willing to go to 74 cents ultimately because the alternative was just too dire for their clients and the investors.

That the fear of a drop down motivated the Priority Lenders to agree the low buy back price of 74 cents.

And by early June, the company's Finance Committee, vets the proposals and determines that the Priority Lenders proposal was the best on virtually every metric that mattered.

So on June 4th, that's when the final negotiations took place. The next day the company selects the Priority Lenders' proposal as the deal and in the following days the term sheets are signed.

So this timeline will show you, Your Honor, why the 2020 transaction was a matter of self defense for the Priority Lenders. If they hadn't pursued it, the drop down transaction

likely would have prevailed risking a severe downside for our clients with disastrous consequences in the event of a default.

And one more thing about the unsuccessful drop down transaction that the Angelo Gordon group put together, everything they complain about and cite is bad faith in our transaction, existed for their proposal.

So for example, they criticize our proposal for relying on the open market purchase provision, but the same was true of their proposal.

They challenge our transaction because it was privately negotiated. But so was theirs.

They complained because our deal required a new credit agreement. But so did theirs.

They challenged ours for limiting participation, but there's limited participation to an even greater degree. Their deal only allowed a minority of lenders to participate.

They argue our deal is done in bad faith because only the preferred lenders were able to gain priority status. But, of course, the same was true of their deal. That's why they did it.

And finally, Your Honor, they argue that the debt was repurchased -- the fact that the debt was repurchased at a prices above the secondary market trading price means ours was done in bad faith. But of course, as you can guess by now,

the same was true for their deal.

Now speaking of the goose and gander rule, you'll also hear evidence that Angelo Gordon and Apollo have engaged in transactions with other companies in which they benefitted, but other lenders did not have a chance to participate. The way thing they are complaining about here.

Angelo Gordon helped finance a restructuring for Envision Healthcare in which existing lenders stepped ahead of other lenders of the same class in the payment waterfall.

And in Mitel (phonetic), Apollo exchanged certain first and second lien debt for new debt with structural priority in an uptier transaction not open to all existing first and second lien debt holders.

So the evidence is going to show that the understanding these Defendants expressed in the board room of what credit agreements allow, is different than what they argue in the courtroom.

To sum up, Your Honor, your ruling that the credit agreement allowed this transaction alone is enough to defeat the implied covenant claim because businesses are allowed to rely on the words of a contract.

But if there's any doubt about that, the evidence you see this week will show that the Priority Lenders acted in good faith.

In fact, their conduct in entering into the 2020

transaction was motivated by the most fundamental business justification of all. The need to protect investors and enforce -- and follow through on that fiduciary duty.

We look forward to presenting the evidence that will show that there was no bad faith here just good business judgment.

And Your Honor, that wraps it up on the adversary. But there are a couple points on the confirmation I wanted to discuss and Mr. Greenberg will discuss them in more details at closing. And we responded to these confirmation objections yesterday in our filing at Document 886.

But just briefly to address the indemnity challenge that the Defendants in Citadel are bringing. There's a number of responses we have, but the one I want to point to today is that their mistakenly characterizing that going forward indemnity is a continuation of the pre-petition indemnity obligation.

And in fact, these are new bargained for indemnity obligations that our clients and the Debtors bargained for as part of a package that would allow the company to move expeditiously through bankruptcy, to not wait for appellate process to play out and as part of that the PTL Lenders agree to equitize the significant amount of their debt.

So the Debtors' agreement to these new indemnification obligation is a valid exercise of their

business judgment and not to mention is entirely standard in bankruptcies, especially those involving take back debt.

The second point on confirmation Citadel objects that the plan is in feasible given the ongoing litigation and the risk that the lenders may make a claim under the go-forward indemnity obligations.

But that argument relies on their entirely speculation -- entirely speculative calculation of damages, which are significantly overstated and of the potential adverse result on appeal.

So those speculative future impacts do not alter the fact that this Reorganized Debtor will be on sound financial footing leaving them well positioned to deal with future financial success.

There's been no finding of liability against our clients or the Debtors by any court whether here or by the State Court in New York or by the Federal Court in New York. So the concept that a potential future judgment with damages no one has ever even attempted to calculate, the idea that that prevents confirmation from a feasibility standpoint just doesn't hold up.

But again, we'll deal with that more thoroughly at the closing arguments next week.

Thank you, Your Honor.

THE COURT: All right. Thank you.

All right, anyone else that supports confirmation wish to make an opening statement?

(No audible response.)

THE COURT: All right, those parties opposing confirmation?

Good morning.

MR. SEILER: Good morning, Your Honor. Eric Seiler for the Excluded Lenders or the non-Priority Lenders, depending on which side is describing us.

And there are others who are here aligned with my interest who are going to make a brief opening as well.

THE COURT: Absolutely. Absolutely.

MR. SEILER: So, they have their own interest, but are opposing something.

Before I start, I didn't want to interrupt the other side, just to note. There are a couple of things in the schedule that Mr. Schrock proposed that are actually different from the schedule we worked out. I'm sure we'll work it all out. But that's not for now.

But the other thing that we did agree that the witnesses would be sequestered. And in my opening --

THE COURT: So the parties agreed to invoke the rule?

MR. SEILER: We did. The rule, I learned that when I was young. The rule.

I said what's the rule and they said you don't have to be a lawyer. Anyway, we did and so I know that they said that Mr. Shaw is here from the opening.

There's some things I would talk to you about that I wouldn't want him to hear.

THE COURT: But he's an expert, right?

MR. SEILER: No, no. He's a fact witness.

THE COURT: He's a fact witness.

MR. SEILER: He might have expertise, but he's a fact witness about the events that occurred.

THE COURT: Mr. Welch, or whose taking the lead on that?

MR. LENDER: So he's -- Your Honor, David Lender for the Debtor. So he is both a fact witness and an expert. He's an expert on evaluation issues and I don't know whether that's --

THE COURT: So, let's me just do it the simple way. Was an expert report provided?

MR. LENDER: We submitted the Declaration for him last night. That's what we were going to move into evidence for his direct testimony on the expert issues. But Mr. Seiler, the scope of what Mr. Seiler is going to get into is probably not those expert issues.

MR. SEILER: What I'm going to talk about is nothing to do with evaluation or the details of the exit financing

economics. It's entirely to do with his involvement in the timeline that you just saw. And there's some things that I think he has admitted that I don't want him to hear in my opening.

THE COURT: What I would ask that we do -- and Mr. Shaw, where are you? Ah. So Mr. Shaw, I'm going to ask and do we have a member of the Weil team find a place for Mr. Shaw where he's out of ear shot?

And then please, when we get to the point where we have gotten past those issues, just deep breath tell me. So that to the extent that's -- there are expert issues that are going to be made and the commentary he's entitled to obviously hear those, although I still didn't get good answer to did you get an expert report? That's how I measure whether or not you're serving as an expert.

MR. SEILER: So just to be clear, the things that I'm going to talk about are -- I'm not going to talk in my opening the valuation at all.

THE COURT: all. Okay, so then --

MR. SEILER: And so, he doesn't need to. And we received a I would call a Declaration that had the valuation report yesterday. And I don't think we're challenging the valuation information is my thought.

MR. GIBSON: Hi, Your Honor, Lee Wilson of Gibson Dunn on behalf of the Priority Lenders. I'm pretty sure that

our witnesses were all told not to Zoom in, but to avoid any issue given that the rule has been invoked, to the extent that any of the testifying PTL Lenders or Mr. Chopra are on the video, please drop now.

THE COURT: So let me ask if you are -- let me do it this way. If you've been told that you are going to be a fact witness and you are on line, I need for you to disconnect now. And I will expect the lawyers to ask that as the first question when they are sworn and take the stand, whether in person or virtually.

All right. And Mr. Seiler, did you have a tech person?

MR. SEILER: I do, Emilio.

THE COURT: And how are you logged on, sir?

MR. EMILIO: Emido.

THE COURT: That makes it easy. All right, you should have control.

OPENING STATEMENTS FOR THE EXCLUDED LENDERS

BY MR. SEILER: Good morning again, Your Honor, Eric Seiler for the Excluded Lenders.

And what I argued on the sumary judgment motion, the Debtor and the Priority Lenders didn't have a slide deck and I did. And I lost.

And so today I thought since they have slide decks, I would just talk to you for awhile about what I think we're

going to show in the case. Maybe that will reverse my luck.

So, -- and I think in listening to the openings there's a lot that we don't disagree about here. For example, we don't disagree that Serta was challenged and it was more challenged during COVID.

And that it needed new money. And I think we saw that everybody who was talking to them, understood that and offered new money. In fact they ended up offering the money that Serta said they wanted, around $200 million.

And we also know that the transaction that was entered into, the uptier transaction, I think was the first of its kind. I'm going to talk about that more in a second. But the company was seeking new money and was exploring with everybody else drop down transactions.

Indeed, they would have been happy to explore it with the Priority Lender group except that -- and I think you heard the economics -- they thought they were less inclined to want to do it because most of them has bought their debt at par. Whereas, other people had bought their debt in the market. But that doesn't make the clients who bought it in the market bad.

Indeed, you're going to see in some of the documents, you'll see in the case that Evercore understood that that made them more open to doing something that was helpful and they wanted to take advantage of that in the

negotiations.

And I'm not complaining -- we're not complaining that they couldn't talk to multiple people. But we ought to look at what the evidence will ultimately show, which is who talked to who about what and when?

And that's the part of the timeline that's going to be important. And in the beginning -- I mean, and it's true Angelo Gordon was thinking about participating in a drop down transaction even before the company reached out to them and Bearings and other people and Oak Tree with the same idea.

Why was that? Because people had done drop down transactions. And they hadn't done the uptier transactions. And so they talk about the claims that are now still in the case.

And I want to be really clear. I'm not here to reargue your decision on open market purchase. That's the decision in this case. Some judgments were granted. The fifth circuit will hear it some day, but that's not for us.

THE COURT: Okay.

MR. SEILER: I am here to say that what was left in the case, good faith and fair dealing, and also the disqualification issues of Apollo that should have -- need to be resolved. That's why we're here.

There are times when some of the facts for good faith and fair dealings sound like facts that might or might

not have been relevant on the open market purchase question. I can't help that.

But we're not trying to argue the other and we're going to -- and as an example -- and this is some place we also seem to agree. We started to use the language the fruits of the contracts and if you read their briefs that came last night, they talk about the fruits of the contracts.

It's interesting because the company says well the fruits are getting their interest paid for the next two years. And certainly that was a fruit of the contract is to get interest and hopefully principal pay.

But another fruit of the contract is what happens if the company gets into trouble and needs to restructure and go into bankruptcy. What happens then? And the contract had provisions that said what happens then. It said that the 1-L holders should be treated prorata, *pari passau*, and it said if one of the lenders get some money or some consideration that the others don't get, they have to redistribute it. That's 218(c).

Now, Your Honor's ruled that the open market purchase exception allows non-prorata treatment. But if the fruit of the contract is getting prorata treatment, and if together the company and the lenders change a bunch of other things to defeat a reasonable objective exception of getting that fruit, that's a good faith and fair dealing claim.

And what I hope to do in the opening is show you the kinds of evidence you're going to get to hear. And then after the trial is over in the Findings and Conclusions and I think a post-trial brief, we will address the very detailed brief that Gibson Dunn put in, which is basically saying again, "We can't bring this claim because it's preclude by your contract position."

I thought that was wrong before on Summary Judgment. I still think it's wrong. I think there's room for a good faith and fair dealing. But I recognize we have to convince you whatever the evidence shows that we've fallen into that -- they did a bunch of things.

Some of them we think were done with some finality and I'm going to point those out of the next few days. But that those things make you decide even though the contractual language on its face isn't the breach, they still imply the covenant of good faith and fair dealing.

And to be clear, obviously we've appealed the other decision and if that changes, that changes. But for this case that's the law and we understand that.

And so -- and I should also say we agreed to bifurcate damages. And so I saw the chart that showed that, well, the prices went down after the deal was announced, but then there was later time that the prices went up.

I actually think that's a chart of indicative

prices. I don't know what evidence they're going to use to put that in. There's not going to be, I don't think, any proof that the volume of debt that our clients held could have been sold at those prices subsequently. I think that's relevant to damages.

I think damages are measured at the time of the breach, not later. But that's all for naught for this case. And I would point out, one one of the things they did to our clients was they put them all on the DQ list in June of 2020. So we have clients that couldn't buy more debt to take advantage of the movement of price.

And with Apollo they had a cloud over their holdings because they said they are DQ'd before hand. So they maybe only had participation rights. So if they were going to be in a position to take advantage of some subsequent sale, they had a cloud that they shouldn't have had.

I say, well, I don't think that's really part of the case, but Mr. Lender showed -- I'm sorry, Mr. Costa showed that chart and I don't -- and I think it's going to be hard to prove that that chart was really available, but I just wanted to remind the Court that damages are bifurcated.

And so now what I would like to talk about is, well, what is it that -- no I think I've talked about that. I want to talk about what is it that we had and I guess I just emphasize this. The -- whatever the rights are, we had to

prorata treatment and to avoid what they did, they were all agreed to be sacred rights.

So most contracts are implied covenant -- breach of covenant good faith and fair dealing, it's just a contractual right. Here to right that requires unanimity to be overcome and everyone in the industry refers to it as a sacred right.

So it would seem to me that if you would do something that could be a breach of the implied covenant against a normal contractual right, it's even more pronounced when it has to do with what's agreed to be a sacred right.

And that's what we say happened in the transaction and we went through a whole transaction before. I know the Court is familiar with it. But one thing that hasn't been mentioned today is it had this extra little wrinkle to it, which was that so you have new money -- and that's the superpriority -- you have the exchange, which now becomes the priority loans ahead of us.

But they all agreed on another provision, which was if the company needed more money, it would come in below them and above us. So there could be second liens, third liens, fourth lien, fifth lien. If the company hadn't gone into bankruptcy in 2023, we could have been further and further and further down the curve.

And their deal gave that right to the company. It didn't hurt them, but it undermined yet another expectation of

ours that we would be treated a certain way. And even the deal they let the 2-Ls jump over us.

So it wasn't only that they undermined the prorata treatment we were entitled to, but they let the 2-L's jump over us. And I think -- so the question is, well, you should have expected that. That's their argument because you had loose documents. Loose documents that allowed an IP code transaction in which the company was asking for.

But let's be clear, no one had ever done a priming facility with a debt repurchase at a discount in a contract that had a waterfall with a prorata requirement that requires unanimity. You're not going to hear anyone tell you that that had ever happened before.

Mr. Chopra's deposition said he'd never heard of it. I don't think Mr. Shaw will say it ever happened before either. I think the parties didn't expect that that could happen. I think it will be viewed as a first of its kind transaction in the leverage loan market.

Now it might be that that doesn't matter. And Your Honor might decide well, but these other things were sort of like it. So, this is just something that's different. But we -- something that is one of the -- that already existed.

And we're not trying to argue at the end of the case that the differences do matter. But the fact shouldn't confuse us.

Nobody had ever done this before. Now, since people have done it. There are differences there, too. And now we're going to, I guess, talk about Envision, which apparently was filed and is across the hall from you, I'm told. So you won't have to wrestle with two of them, and Mitel.

And I predicted in the summary judgment there are going to be more them. Because we didn't get an injunction in 2020. And so people said, ah, and now you've ruled on open market purchase, which is important in the literature and is going on.

So I think whatever happens in the future doesn't tell you what the expectations were in 2020. And indeed, I think it's the expectations in 2016 that matter when the loan agreements that we're talking about being violated were made, but it certainly 2020.

And so anything that happened afterward doesn't count and I don't think there's any suggestion it happened earlier.

So let me talk for a minute about the drop down that we were exploring because there are some differences. First, the company requested the proposals even though Angelo Gordon was thinking about it before that. Drop downs had been done in other transactions. Amendments to the loan documents were not needed in the same way. Yes, there was a new credit agreement, but the kinds of amendments that you're going to

hear they put in here weren't required. There's I don't think any evidence that we saw at the special indemnity, and I'm going to talk a fair amount in a few minutes about the indemnity.

And the Gibson Dunn group could have proposed a drop down transaction, too, they could have proposed to be included in ours. Yes, the modeling showed it not being taken by everyone, and they might not wanted to have been in it because they didn't want to trade debt at a discount because they'd bought their debt at par. But we don't know because the final -- the evidence is going to show that the final terms of the Angelo Gordon drop down proposal was never reached because the company chose to go in a different direction.

And it never -- and do we had two parallel negotiations going on. One with our group and others like us and one with their group and Bering's allowed to jump between the two groups at the end. Because why? Because to do their deal you needed 50.1 percent approval to get the amendments. They didn't have 50.1 percent in their group. They had 39 at the end, and they needed more.

And so the company chose to let Bering's, who had started in their group talk to us in the middle, made its own proposal, left and joined them along with Oak Tree to get over the top. It doesn't make that opportunity available to our group. They could have said to our group, "Well, you have

30 percent or so" is what we had, that's too much because we don't want to be way over 50.1. But they could have said, "Well, we'll let you in halfway."

There were other things they could have done to try and make this available to everyone. And I'm going to ask Mr. Shaw and Mr. Chopra about those decisions at the end and why they didn't actually have competition over the thing they ended up doing. Who was willing to give the biggest discount contingent on putting new money into the company at the level that's required and maybe even rewarding the priority group lenders who had led the way giving them some kind of premium for having stood there, of if they're the backstop, because that's what happens in other deals, paying them for being the backstop, but making it open to everyone, which is what they had proposed in the beginning. And that's the problem, that they didn't do any of that, and I think those are the differences.

So I think you're also going to see evidence that some of the motives and tactics implied both by the company and by the lender group are evidence of bad faith, or at least the absence of good faith and fair dealing. You'll see some evidence that some of them at least saw our group as a stalking horse and they really hoped to use us to leverage against their group. You'll see that in some of the decks that we're going to show you.

And you're going to hear evidence that Advent, which owned Serta, was the controlling shareholder and Mr. Prince, they didn't really want to do a deal that involved Apollo because they were competitors and they didn't want to have a credit where Apollo had an interest. So and that of course is part of the story behind the DQ. Apollo is viewed as someone you could negotiate with, but we don't really want them at all.

So you're going to see evidence that talks about the role of Apollo, and I think what you'll conclude is, respectfully, that we were only an option if the other option fell apart. So we were the stalking horse to get the other option more motivated, but we were only an other option if the option fell apart. And there's going to be a lot of evidence about who got to be in and who got to be out of it. I'm not talking about subsequent purchases, those are fine. I'm talking about who got included in the transaction that they needed to get the 50.1 percent.

And so we're going to point to that as an improper process, not the beginning, not through the April, the end of April, but in May, the very end of May and the fist of June, and then we're going to show which provisions they tweaked to make sure they got what they got, and there's some evidence -- we're going to show you improper communications with third parties that I'll wait till we show them to talk about their

significance.

And, but the one thing I do want to talk about now is the indemnity because it relates both to the confirmation issue and to the good faith and fair dealing. And we should at least agree on what it is, and I think with the help of Emilio, I will be able to do that with exhibits that will come in. I'm hoping, because I've been schooled by Porter Hedges people about how to refer to exhibits for the case, so I'm going to try my best to get it right.

THE COURT: I makes the Record work better.

MR. SEILER: Well, I know that. So I'm going to want to have to bring up Adversary Proceeding ECF 248-7, which is also Defendant's Exhibit 7, and let's see if -- so this is the old loan agreement and if we can look at -- no, we got to go to the prior page. Let's just make sure we're on the right -- you can see the beginning and down at the bottom we can see 903(b), so let's scroll down. There we go, and let's bring it up so we can see it.

So in each of these -- so this is the old loan agreement, and it has an indemnification for all kinds of losses, claims, damages and liabilities including fees. So let's go to the second page now, which is the intro.

Now, and there's a long discussion, anything to do basically with the entry and execution, delivery or operations under the loan documents, but then there's a provided. And

the provided's about 10 lines down now, it's in the middle of your screen. "Provided that such indemnity" -- you went too far, come back just a little, there we go -- yeah, "is not resulting from the gross negligence, bad faith or willful misconduct of any such indemnity, or to the extent such judgment finds any such loss, claim, damage or liability has resulted from such person's material breach of the loan agreements."

So you have a carve out from a broad indemnity for the usual things, gross negligence, willfulness, bad faith, or a material breach of the loan documents. And if that were the indemnity that we had here, I think Citadel still objects to there being any indemnity and I'm not trying to interfere with that, but at least that's an indemnity that would allow my -- if I win my claim against the lenders, either because they made a material breach if we win on appeal in the 5th Circuit and it went on remand, or we win on bad faith, if bad faith -- bad faith, I should be honest with this, bad faith is not necessarily the same as absence of good faith and fair dealing, but if we win absence of good faith and fair dealing enough that we've shown bad faith, then this indemnity wouldn't apply.

And that's why the lenders care about it. And I was surprised, before I show you the next one, to read in the Gibson Dunn brief filed yesterday noon on page -- the last

page, 56, I don't think it has an ECF number that I can point to. I'll just read what they say. They say this is Paragraphs 127 and 128 of their brief, they say, "The plan merely continues pre-existing and long-standing indemnification protections. Serta agreed to indemnity all lenders against any losses, claims or liabilities arising out of, in connection with, or as a result of their performance obligations under the 2016 contract."

That indemnification carried over to the PTL loan agreement and proved warranted because they were sued and then they say, "Indemnification like the one Serta provided to the PTL Lenders are included in credit agreements as a general rule. This plan carried -- thus carries over the same indemnification protections that are common practice in the industry."

If that's all they'd done, that would all be true. But that's not what they'd done, and that's why when Mr. Shaw puts in his confirmation order to the Court, he talks about the new credit facility being on market terms, but then he says, "I understand the indemnification provision was a central component and condition to the PTL Lenders' support for the plan and the overall settlement, which is what you heard in the opening.

So now let's look at the difference, and it's 19 words. If we can now bring up -- where did I lose the --

well, you know what it is, I'm going to say it for the Record though. ECF 254-16 -- oh, here it is -- in the adversary proceeding. And it looks -- we need to get to the right page, which is, I think it's B, come down to that, so B starts at the end, go down to the bottom a little more so the Court can see it. It's the same beginning of the indemnity, the same scope, and then we turn to the next page, and let's blow it up a little bit, we'll find the same proviso with the same carve out, other than such as loss or claim resulting from a material breach, but then after the word loan documents we add 19 words, "Excluding in each case for the avoidance of doubt any indemnity's participation in the exchange transactions and the transactions. Exchange transactions are the 220 deal -- 2020 deal.

So we have a carve out and then we carve out from the carve out, or accept from the carve out this deal, so there's no longer a carve out. So if we win and this is the indemnity, which is now the indemnity in the exit financing because they're not trying to run it through the plan, I think, they've changed their tactic on it.

Then the company had to pay them. So if we win that they acted in bad faith, or we win that they committed the material breach of the loan documents in 2016 by doing this deal in 2020, then they're going to come to the company post-bankruptcy and say, "You owe us $200 million or $300 million

or $12," whatever it turns out that we win.

THE COURT: Right. And help me -- if you've been paid, which is the only thing that would trigger the indemnity, why do you care?

MR. SEILER: So I -- well, I care -- well, because I'm not in the company, that's a fair point. I guess I care because they're insistence on having this in the plan so for me this --

THE COURT: I'm not criticizing, I'm just trying to understanding economically because the way I read that is that it never gets triggered until -- I think I heard you at one prior hearing say, "We'll take $600 million," it may have been Mr. Herman, I don't remember which --

MR. SEILER: He always wants more money.

THE COURT: Yeah, he always wants more money.

(Laughter.)

THE COURT: But if it was once you've been paid your, let's call it $600 million, then why do you care? So Mr. Herman just told you what the answer is.

(Laughter.)

MR. SEILER: Well, okay, we get 1 percent of the company in the plan so we care a little, that's one answer.

THE COURT: Okay. But I mean --

MR. SEILER: Even if by voting no, we still get 1 percent, so if the company has to pay in the future, that

hurts us. I think people like Citadel care more because they weren't the old --

THE COURT: I have a different question for them. I'm just trying to understand why you care.

MR. SEILER: Well, we -- I think we care for that reason, and but we also care because of the insistence on this provision, it was an extra provision that forced everyone to do this deal this way. I mean, what the --

THE COURT: All right. So let's take a step back, because -- I mean, and I saw the difference and, you know, I made the comment earlier, I think it was to Mr. Shrock about I'm going to see testimony about business judgment and why it was done the way it was done. That's why I made that comment.

And so I'm just -- and because of the change there's going to have to be -- there's going to have to be some fairly persuasive testimony on that issue or there was a give and a take and here's what we got and this is why we gave that up, whatever it turns out. I don't -- I haven't the foggiest notion what it's going to be.

But I'm still trying to understand economically, and because you're not in this for 1 percent of the company if you get a $600 million judgment and they have to pay. I'm just trying to understand economically why you're -- why you care about this. I mean, if you just tell me because it's a technical confirmation objection, I got that, and I always

appreciate honesty. If there's something else, I'm genuinely trying to understand.

MR. SEILER: Well, it shows that they knew that there was a problem.

THE COURT: So let's --

MR. SEILER: That's one thing.

THE COURT: -- it shows -- who's they?

MR. SEILER: The lenders. It shows that the Priority Lenders appreciated that notwithstanding how things have turned out since Your Honor ruled against us in open market purchase, and they blew against us on good faith and fair dealing. They cared so much that they wouldn't do the plan unless they got this protection, so that tells us/*sta something about that they knew maybe they were doing something wrong, and that's why we cite the *Martha Stewart* case in our brief.

THE COURT: All right.

MR. SEILER: So there --

THE COURT: So can I stop you there?

MR. SEILER: Certainly.

THE COURT: Because I genuinely want to understand this point. I mean, they're going to get up and say, "Look, if we're going to give up the leverages that we had as a lender in order to take equity, we wanted this protection." And this is just -- this is just good lawyering and it's just

good business. I understand why they care. I want to understand why you care.

MR. SEILER: Okay. But, so I care because their caring shows that they thought they were doing something that was questionable. That's the point I was just trying to make. And I also think this all goes a little bit to the whole question of equitable mootness because I don't -- if the reason I don't care is --

THE COURT: I'll circuit for that.

MR. SEILER: I'm saying I don't ever want to hear them say, "Well, it's too late now because this so bad for the company." So if they're never going to say that, I care a little bit less because I want -- so whether or not -- because I don't want them to say, "Well, the company can't afford to lose on our indemnity, so and therefore you can't pursue your appeal. We want -- we came here -- it was Mr. Herman that did the talking, we said, "Send us to New York." But we said, "Even if it's here, this doesn't need to get decided as against the lenders for the plan to be confirmed." And you said, Your Honor, "Well, but it does because I have to know that the transaction works over the market purchase," but on the good faith and fair dealing the things that the lenders did, this -- if -- it's only this indemnity that makes this an issue for the company at all.

THE COURT: So what you're telling me is that

Mr. Shrock was right, or whoever it was that stood up and said it, "This is just litigation strategy, there's not an economic reason" --

MR. SEILER: Well --

THE COURT: -- that's the one plan.

MR. SEILER: -- that's the one. I don't want to give up on the 1 percent, but it's only 1 percent.

THE COURT: I got it, no --

MR. SEILER: I can't -- but, you know, people fight about -- we're fighting about the million and a half hours that the equity shouldn't get because it violates the absolute priority rule, too. That's a confirmation issue.

THE COURT: We'll get there.

MR. SEILER: Okay. Well, I'm going to -- with that I'm going to let Mr. Herman convince of you of that --

THE COURT: Okay.

MR. SEILER: -- at the end of the case.

So I -- look, I think it's -- it matters what the -- I mean, I'm looking forward to -- I'll be honest with you, I'm looking forward to hear how they agreed to it, too. We asked Mr. Shaw, he didn't know he didn't do the negotiation. I don't know who did it. You know, we had the discovery we had, we had this tight time frame, we did the best we could. But I'm looking forward to hearing why this indemnity got changed.

And then I also think there's an issue because the

way they were first going to do it was having the provision in the new loan agreements slide through. And I think we pointed out, well, you can't just pick a paragraph out of an entire agreement and have that slide through. So they said, "Well, we're going to put it in the new exit financing agreement." And then I asked, "Well, why does it go there, why are the people indemnifying people who aren't even party to that agreement?"

You have some people who were both in 2020 and are still there, but you have people who for part of this transaction in 2020 who were protecting themselves from their holdings in 2016, they're long gone, and they're getting the same benefit. And I think that's what Citadel's going to complain about because they're actually come forward not just to complain, but to say they've got money.

So but I guess I'll stop talking about that because I don't want to step on their toes, but I think it's an example of, among other changes they made that made this deal work in a way that took away our fruits, which it wouldn't have done, and I think they've admitted that, they wouldn't have done it unless they got the indemnity therewith because they still won't do it even after Your Honor's ruling on open market purchase.

So I think I will -- unless you have some more questions for me, I apologize if I went longer than --

THE COURT: No, no, no.

MR. SEILER: -- I promised, but that's --

THE COURT: I appreciate the engagement.

MR. SEILER: -- that's what I have to say. Hopefully the evidence will show what I've said, and at the closing I'll -- because otherwise you'll point that out to me I fear, so anyway. Thank you very much.

THE COURT: Thank you.

All right. Who's next? And are you using Mr. Carlock (phonetic), too, or --

MR. LIEBERMAN: I'm not using the deck. We're all good.

THE COURT: Ah, okay. Got it. Thank you.

OPENING STATEMENTS ON BEHALF OF THE LCM DEFENDANTS

MR. LIEBERMAN: Good morning, Your Honor. Neil Lieberman from HSG on behalf of the LCM Defendants.

I'm not going to rehash the topics that have been discussed by my colleague, Mr. Seiler. I'm going to concentrate on the theories LCM is pursuing that were not just addressed, although we agree with the theories they're pursuing on the good faith and fair dealing.

But before we get to the substance I think it's important to focus on LCM's role because this morning you've heard counsel for Serta tout their restructuring process, about how Serta negotiated transaction alternatives with

70 percent of their lender base and your heard Mr. Costa say that the reason the PTL Lenders abandoned the pro bono terms of their initial offer was a defensive measure, self-defense to fend off a deal with predatory lenders that would destroy their investment value.

But none of this applies to LCM. It is uncontested that LCM was not asked to participate to the 2020 transaction negotiations, neither the company nor the PTL Lenders asked them to participate, and you'll hear representatives from the company, the PTL Lenders and advisors testify to that fact. And it is uncontested that LCM wasn't involved in a so-called predatory bid that the PTL Lenders felt constrained to defend against. LCM was not a part of the Apollo transaction, and on a more basic level Mr. Sim from Eaton Mense (phonetic) will testify that the LCM CLOs are not considered predatory lenders.

And LCM isn't alone. They are aligned with a class of long-term Citadel lender that reasonably expected to be treated prorata with their fellow lenders, that were no threat to their fellow lenders, that were given no opportunity to participate in this restructuring, and were as badly damaged by the PTL Lender's conduct, if not more so, than they would have been under any other alternative transaction.

Each of the parties negotiated -- to the negotiations, the company, the PTL Lenders, and Advent fully

understood that they were leaving like LCM behind. Indeed, the value of this transaction to the PTL Lenders depended upon leaving behind as many of their fellow lenders as possible. So when the PTL Lenders fall back on arguments about whether they had to defeat a value destroying transaction by predatory lenders, to lenders like LCM, it was the PTL Lenders that caused disastrous consequences, and purposely so.

Now moving on to the claims that we're pursuing: In these proceedings we're focused on a breach of the credit agreement and the implied covenant to that agreement that arise out of the amendment process. And as you've instructed, we've steered clear of the open market term and issues related to it per Your Honor's order. And while the testimony at trial will corroborate our theories, they stand on their own based on the undisputed facts of the case.

Turning to the breach of contract: The PTL Lenders purported to amend the credit agreement with 50.1 percent of the lenders, the so-called required lenders requirement. That figure comes from Section 9.2(b) of the agreement which requires that, quote/unquote, "require lenders constitute more than 50 percent of the sum total of loans outstanding at the time."

But at the time the PTL Lenders amended the agreement by purporting to constitute required lenders, they were no longer holders of the first lien loans because at the

very moment they became PTL Lenders in exchange for their first lien holdings pursuant to the open market purchase agreement and the PTL credit agreement which were all executed and came into effect simultaneously.

And as you'll hear from the PTL Lender witnesses, none considered agreeing to the amendment without the ironclad promise that they would be immediately extricated from the loans. They never intended to be subject to their amendments.

And so in this instance the *Murray Energy* case is instructive. In that case there was a commitment to exchange loans and then an amendment signed that was challenged on the same basis. And the court rejected it saying, "No, a commitment is an exchange." Here we have the exchange occurring simultaneously.

The PTL Lenders will argue that the amendments, as a technical matter occurred just prior to the exchanges because that's the way they wrote one of the agreements, but it is commercially unsustainable and unreasonable to interpret a contract in a fashion that allows a majority of contract participants to vote to amend the contract so that the amendments never apply to them. Indeed, the purpose of a majority vote requirement in these documents is to be protective of the lenders.

And I point Your Honor to the treatment of certain affiliated lenders when they repurchase are allowed to

continue to hold loans. But under 9.05(g)(6)(A) of the credit agreement, if they vote those loans, that doesn't count to the numerator or the denominator of the required lender. And that just evinces of (a) an intent of the parties that when you're in line with the lender -- when you're in line with the borrower that you shouldn't be able to meet the required lender threshold, and that's what happened here.

And similarly the exceptions to the contract for amendments that require all adversely affected lenders to vote -- provide additional support. It just makes no sense to have a situation where there's a bunch of provisions that require adversely affected lenders to vote for them and then -- but if you don't fall within that and you just fall within the required lender bucket, that required lenders don't have to have any interest whatsoever in ongoing interest in those loans.

In terms of moving on to good faith and fair dealing, even if the Court holds the amendment process was technically permissible under the credit agreement, the uncontested facts of the amendment support a claim for breach of the implied covenant. And Mr. Costa in particular said the implied covenant must come from the words of the contract. I mean, that basically reads out to duty. And the duty exists in New York, it's more than just words of the contract, and it basically says that neither party will do anything that has

the effect of destroying or injuring the right of the party to receive the fruits of the contract based on a reasonable belief of what -- that was justified to be understood in the contract.

And so -- and that's an objective test. Here, the applied covenant claim is clear, the PTL Lenders were paid for their consent to amend the agreement on their way out, and they reaped a personal benefit and destroyed other lenders' first lien priority rights. The testimony will bear out that first lien priority status was a fundamental aspect of the 2016 credit agreement, and that the amendments deprived LCM of that element.

It was done in a manner to deprive the non-participating lenders, they were not even aware of the deal until it was fully baked, they didn't get the opportunity to vote on it. The deal was precisely 50.1 percent, and even though Serta was willing to open the exchange to a larger number of lenders, and the parties negotiated all manner of other terms, the PTL Lenders never budged off of that number. That is solely because they were out to maximize a return.

The PTL Lenders would never agree to amend the agreement unless they received priming liens, and the manipulations of rights like this for personal gain that deprive other parties of the benefit of the bargain is a violation of implied covenant under New York law. We cite

cases in our brief to support that. *Richvale* is one, *Boardriders* that was recently decided is another.

New York law also allows for consent of non-participants to cleanse implied duty. That wasn't done here. Cases that are instructive there are *Cass*, 986 WL 13008 from Delaware Chancery Court, and the *Optigon v NYDJ*, which is Index Number 656677-2017 which is a New York Supreme Court case.

The PTL Lenders will no doubt argue that because everything was executed simultaneously, the amendments came into effect a millisecond before the exchange. This is a meaningless distinction in a good faith setting. It elevates form over substance because the consent and the exit were contingent on one another and were all agreed to as part of one bargain. The *Key Bank v Franklin Advisors* case from the Southern District Bankruptcy Court has held that transactions that lack economic substance or that elevate form over substance are violations of the good faith and fair dealing duty. And violate -- well, I'm going to stop there and leave it at that.

THE COURT: So just listening to what you said, is it your belief that as I listen to the evidence regarding the implied duty of good faith and fair dealing that I could reach different conclusions as to particular Defendants?

And I want to be very clear, I heard you starting to

separate yourself from Mr. Seiler's clients, and I am curious is -- do you believe that that's possible?

MR. LIEBERMAN: I actually don't believe it's necessary. I think the whole -- do I think --

THE COURT: That wasn't the question.

MR. LIEBERMAN: Do I believe it's possible to separate us?

THE COURT: Uh-huh.

MR. LIEBERMAN: I don't think -- I think we -- every reasonable belief, reasonable and justifiable belief is an objective standard. So --

THE COURT: Yes, I mean, if it's -- everybody talks about that but let's -- and this by no means pertains to anybody.

Let's assume that you have one party who's actively engaged in the exact same conduct and one who isn't. It is an objective test, but it's based upon reasonable expectations under the circumstances faced, right? I don't ignore reality when I start to look at that.

MR. LIEBERMAN: No, but I think the circumstances, as Mr. Seiler said, were that this was a transaction that no one had ever --

THE COURT: Okay. I want to you to ignore Mr. Seiler for a second, and I want you just to talk to me. You started off the first part of your argument by saying,

"We're different." And I'm trying to understand why -- I assume that every time you step up to the lectern you mean something by the words you choose. I'm trying to make sure I understand the import of what you were telling me.

MR. LIEBERMAN: To me, the import is we're different, we're different as there's a whole class of lenders that are differently situated.

THE COURT: All right.

MR. LIEBERMAN: The thrust of the arguments you heard this morning were painted as a broad brush. And --

THE COURT: All right. And you think --

MR. LIEBERMAN: -- so I'm distinguishing between -- yeah, what I'm saying, I think those arguments fail in their entirety --

THE COURT: Well, let's --

MR. LIEBERMAN: -- once you recognize that there's a class of lenders --

THE COURT: -- assume they don't, let's assume they don't, could I reach one conclusion as to Mr. Seiler's clients and an entirely different conclusion as to your clients? That's what I'm trying to understand.

MR. LIEBERMAN: I suppose there's a certain set of circumstances where you could do that.

THE COURT: But you don't believe they're applicable here?

MR. LIEBERMAN: I don't believe it's -- I wouldn't -- I don't think it's necessary to reach that conclusion here.

THE COURT: Didn't say necessary, possible.

MR. LIEBERMAN: It's -- I suppose it's possible, Your Honor.

THE COURT: But you don't think the facts would support reaching different answers, is that --

MR. LIEBERMAN: I think the facts support reaching the answer we're advocating across the board.

THE COURT: Okay.

MR. LIEBERMAN: I mean, I don't think that it's necessary to -- I wouldn't distinguish as I think we're talking about their conduct, vis-à-vis lenders that are excluded from --

THE COURT: Okay.

MR. LIEBERMAN: -- the transaction.

THE COURT: All right. So I get Mr. Seiler's motivations. I got him in the box I want him in, I understand him perfectly.

(Laughter.)

THE COURT: What is it that you're hoping to get out of this?

MR. LIEBERMAN: Our client has been interested since 2020 in having its position vindicated.

THE COURT: What does that --

MR. LIEBERMAN: As --

THE COURT: -- you want me to tell you that you're right? The folks you represent don't care about that, they care about money.

MR. LIEBERMAN: Well, those are two elements. One, I would caution that my client cares very much that they may be right.

THE COURT: It wasn't a criticism.

MR. LIEBERMAN: Well, no, I'm just saying they do care very much if they've been right. They spent quite a bit of money and effort litigating this issue for three years and you know what the size of their claim is relative to what's going on here.

THE COURT: Right. So --

MR. LIEBERMAN: So part of the motivation is that --

THE COURT: -- so I'm going to come back to where I started, and I really want a genuine answer to this.

What is it that your folks want? Do you want to talk to them and come back and answer that for me, or do you know?

MR. LIEBERMAN: It's both, they would like to be vindicated in their view that this transaction was outside of market.

THE COURT: Okay. So you --

MR. LIEBERMAN: It was destructive to the market.

They would like to --

THE COURT: -- so you would have a hard time convincing me that that's why you're here. So what's Step 2?

MR. LIEBERMAN: Step 2 is obviously a financial reward related to that.

THE COURT: So it is a financial reward in terms of you want the right to participate, is it you want someone to write you a check, is it -- I'm trying to figure out -- I'm trying to figure out exactly what role you're playing.

Again, I'm not being critical, I'm genuinely trying to understand it.

MR. LIEBERMAN: As between those options, I'd have to go back and ask, Your Honor. I mean, I think that there's -- in recent times there's not been any discussion in the context of --

THE COURT: And I'm not suggesting that there should be. What I'm trying to figure out is that there is -- there are a set of circumstances that could occur where you could actually prevail and do worse. Have you thought about that? I can see that scenario. Have you -- that's why I'm genuinely trying to engage, trying to understand what your strategy map is because it's different than Mr. Seiler's -- it should be different than Mr. Seiler's, and I'm just trying to understand.

Because you could push this so hard, turn out to be

right, and the outcome is actually worse than if you'd done nothing. And I'm just trying to understand. I haven't figured you out yet.

MR. LIEBERMAN: I don't -- well, I don't think my client believes that, I don't think we do, but let's --

THE COURT: Sometimes it takes reality to help educate folks. I got that. Okay. I appreciate your engaging with me.

MR. LIEBERMAN: You got it.

THE COURT: Thank you.

MR. LIEBERMAN: Thank you, Your Honor.

THE COURT: All right. Who's next? Come on up. Good morning.

MR. MILLAR: Good morning, Your Honor. James Millar of Faegre Drinker Biddle & Reath, this is my colleague, Ms. Kristin Perry, on behalf of Citadel. You've heard our names once or twice.

THE COURT: Absolutely.

MR. MILLAR: And now we get the chance to talk. Delighted to be here. Thank you.

OPENING STATEMENTS ON BEHALF OF CITADEL

BY MR. MILLAR: So, Your Honor, Citadel is a holder of both the FLSO claims and the non-PTL claims. At bottom Citadel is a big supporter of the company. We believe in the company, we are aligned with the company in wanting to see it

succeed after Chapter 11, and we would invest in helping. And we have indeed put our money where our mouth is. We have proposed a fully committed $315 million alternative exit financing facility and we believe this is a better deal for the company -- better for the company, better for the stakeholders, better for the creditors and the equity holders.

And, Your Honor, we think that the company should execute on this and that they can execute on this because it actually provides better treatment for the voting classes. And that's really important. And I heard some commentary from Mr. Shrock about the difficulties in effectuating this. I don't think it's that difficult. I think the Debtor does, Number 1, exercise their fiduciary duty out, everyone knows they have it.

THE COURT: Absolutely.

MR. MILLAR: Number 2, take the existing plan, delete the indemnity and say, "Here's our amended plan." Maybe have to clean up a little bit of the condition for precedent, and then come to you and say, "Okay, these classes are actually being treated better, you don't need to re-solicit them. You have the votes, let's confirm the plan. We could do it this week."

That's better for the company, and we think they should go down that road. So I'm going to be here all week --

THE COURT: Sure.

MR. MILLAR: -- and I'm going to be saying that, we think they should go down that road. That's what we're trying to get them to do. And we don't think -- just one other point on that, we don't think it's just in their business judgment, Your Honor, these are things happening before you. You have some judgment here, you know.

THE COURT: So let's be clear, my judgment is simply whether or not the Debtors have acted in a range. It is never a substitution of what I might have done for what they've decided to do.

MR. MILLAR: Of course. But I think you could push them on that. I think you can say to them, "Look, this looks like a good deal."

THE COURT: I can push everybody on a lot of things.

MR. MILLAR: Yeah.

THE COURT: So if I could, let me -- if I could poke and prod just a little bit --

MR. MILLAR: Yeah, absolutely.

THE COURT: -- to understand what you've done. So you made a proposal --

MR. MILLAR: Uh-huh.

THE COURT: -- and the first time I found out about it was yesterday. Had you talked to the Committee before you did that or since you've done that?

MR. MILLAR: We've not talked to the Committee --

THE COURT: Because why not? Because you know how this goes, I mean, you've been doing this a long time. You've got to have a friend. Right? You always need a friend.

MR. MILLAR: Yeah, you know, look, I'm happy to talk to the Committee. If they -- I shouldn't say we didn't talk to the Committee --

THE COURT: All right.

MR. MILLAR: -- we didn't talk to them about the exit financing. We did -- Mr. Wilson is here somewhere -- I did speak with Mr. Wilson a few times about the things that we were concerned about in the plan.

THE COURT: Right.

MR. MILLAR: But at the end of the day, you know, what -- we really want to do the talking and our talking really goes towards the Debtor, is the new money. I'm happy if the Committee wants to have that discussion. They -- I don't mean -- I mean, they have their own interests, and I felt my best counterparty was the Debtor.

THE COURT: I got it. So you didn't -- hadn't yet gotten a lot of traction with the Debtor.

Did you talk to Mr. Lieberman?

MR. MILLAR: Mr. -- you'd have to remind me of the --

THE COURT: The gentleman I was just picking on.

MR. MILLAR: Oh.

(Laughter.)

MR. MILLAR: I spoke with the Paul Weiss group, I -- we did speak with Mr. Lieberman, again, previously in the case. Look --

THE COURT: So you can't beat the giant, you've got the isolate the giant. I mean, this is just basic stuff. So you didn't talk to Mr. Lieberman.

MR. MILLAR: I did not speak to Mr. Lieberman about the exit financing.

THE COURT: Talk to -- you wouldn't talk to Mr. Costa because he's the litigator, but did you talk to the business people for his clients?

MR. MILLAR: And I don't mean to be dense here, you're going to have to tell me who Mr. Costa represents.

THE COURT: Mr. Costa, well, he's PTL.

MR. MILLAR: PTL. So, look, we spoke with the Debtor and their professionals --

THE COURT: Okay.

MR. MILLAR: -- and that we had to start there.

THE COURT: Okay.

MR. MILLAR: That's where we feel we have to start. And indeed they're the ones who are going to come up here and say that --

THE COURT: Right. But let's be practical for just a second. You know, you do this at the last minute, which,

you know, I mean, I'm not going to tell you that I've never done that. But you do it at the last minute. Yes, you've got to start with the Debtor, but the Debtors are somewhat -- I mean, they've got pressure at them from all sides, they're trying to run a balance and it's hard for them to step out of a course of action once they're committed unless all of those folks who are pushing them forward start to see your view of life and if it really is a better deal and if there are better options and, you know, whatever your proposal was, you know, what can they, you know, what can they extract in addition to that?

I mean, you know how this process works. So I got it that you had to start with the Debtor, but it just seems to me that you started with the Debtor and then you stopped.

MR. MILLAR: Actually, no, I mean, if I may?

THE COURT: Please.

MR. MILLAR: Let's rewind the clock a little bit, and this is not in our papers, but back in February we tried to broker a deal. My client actually --

THE COURT: I don't want to talk about February. Here we are in May.

MR. MILLAR: Right. But then because what we're trying to do, Your Honor, is get to a place where this company can exit bankruptcy in the best shape possible. We tried to broker a deal on the litigation, we sent a term sheet to both

sides.

THE COURT: Right.

MR. MILLAR: Then we raised the infirmity about the indemnity in the plan. In response to that they said, "Well, there's nothing we can do about the exits in the exit financing" -- somewhere around late April.

THE COURT: Right.

MR. MILLAR: And we said, "Well, we can fix that problem, too." We were trying to fix every problem that we could see.

THE COURT: I got it. And I want to try to help you put your best foot forward --

MR. MILLAR: Okay.

THE COURT: -- because what I want is I want the best capitalized company with the greatest chance of success. If it's going to come out, I want it to come out with -- to be as good as it can possibly be. And if you can help that, I'm trying to nudge you in terms of what your next steps are.

You know, you're not going to care about a lot of the evidence we're going to hear, which means you have a captive audience in terms of starting to work. Everybody's got multiple lawyers here, everybody's got folks that can take advantage of conference rooms and out-in-the hall discussions and that sort of thing.

And if -- and I'm not suggesting that they're not,

but if your folks have really brought money to the table and they're committed, time to start -- time to start trying to find a friend. And I say it lightly, but I mean it. It's the --

MR. MILLAR: I hear you.

THE COURT: -- only way you get those things done. I've been in this courtroom for 20-plus years standing where you're standing. I know how many things I got down out in the hall, all because I found a friend.

MR. MILLAR: I hear you. I hear you. Look, I mean, let me be clear with you. We haven't given up --

THE COURT: Okay.

MR. MILLAR: -- we're going to take that advice to heart. We're going to work the phones, we're going to talk to lawyers, we're going to try and find people who are interested in our exit financing, because our exit financing is a better deal. And, Your Honor --

THE COURT: And are you going to put somebody up to walk through me, do a comparison or --

MR. MILLAR: I'm glad you mentioned that. We, well, I don't have -- I haven't put a witness on the Witness List.

THE COURT: You can do it through Mr. Shaw, can't you?

MR. MILLAR: That's exactly where I was going to go. I have a term sheet and that term sheet lays out all the

material terms and it says, "Equal or is better." And we can go through that very quickly, I don't think he will disagree. No one on their side has said that our exit financing isn't better. What they say is, "Well, we can't do it." I think they can actually. I think they can.

THE COURT: Yeah. I mean, that's part of -- that's part of your job. But, you know --

MR. MILLAR: Yeah.

THE COURT: -- it gets a whole easier if you'll find a friend.

MR. MILLAR: Yeah. So, Your Honor, by the way I do -- I would be remiss if I did not mention that we did put in a demonstrative and I will ask Mr. Shaw about this, but for the Record it is Citadel Exit -- I'm sorry, Citadel Exhibit 36, Document 877 -- Docket 877, Page 28, it's a 2-page demonstrative, and it just shows how the plan is better.

Why is it better? A couple of quick reasons: One is that without the indemnity obligation, the equity is worth more. We can debate how much more, but it's worth more. And the second is that under our plan, creditors get a choice, they can take the equity if they want it, or they can cash out. And for the FLSO they can cash out at 102. That's their -- that's the call priced post-effective date. We're willing to pay 102.

THE COURT: So help me -- so 877 is a single

document that is an Exhibit List, I mean, you did the catch-alls, but it's effectively 1 through 36?

MR. MILLAR: Yeah, it's the last exhibit and it's -- I'm told it's on Page 28.

THE COURT: Ah, okay, because it started with Exhibit 35, I was confused.

MR. MILLAR: Yeah.

THE COURT: Okay.

MR. MILLAR: Exhibit 35, we'll come to that with Mr. Shaw.

THE COURT: Okay. So it's --

MR. MILLAR: That's our exit financing.

THE COURT: And so it says -- it's entitled, "Supplement to Citadel's Alternative Exit Financing Offer."

Is that what you wanted me to look at?

MR. MILLAR: Yeah, please. Yes. And it's pretty straightforward, Your Honor. It has the three classes, Class 3 FLFO, Class 4 FLSO, and the non-PTLs. And if it --

THE COURT: Okay. So you did -- you picked the parties that -- I now understand. I thought it was a complete plan comparison.

MR. MILLAR: Well --

THE COURT: I misunderstood.

MR. MILLAR: -- look, I mean, noting else changes. Right? And that's part of the point. Nothing else --

THE COURT: I didn't notice, so I was asking.

MR. MILLAR: Yeah.

THE COURT: Okay.

MR. MILLAR: Yeah. So we have -- we think that alternative works. And again, I'm not here to blow up any plan, I'm here to see a plan succeed.

THE COURT: Look, it doesn't matter to me why you're here.

MR. MILLAR: Yes.

THE COURT: If you have something that's better than -- for the Debtors, then I've got -- again, my view is I have the best people in the world in the courtroom and if they can't figure out what's better, then if there's a problem, then that's where I come in.

MR. MILLAR: Yeah, and --

THE COURT: If you've been as open as you say you have been, then, you know, you need to go talk to people.

MR. MILLAR: Yeah, and look, I know I don't want to belabor this point, but we do think that the Debtors need to engage with us. I mean, I can talk with the Committee, I can talk with the non-PTLs, and I'm sort of wondering if that -- you know, it's helpful to me at the end of the day, given the -- what I see as adversity between these parties.

THE COURT: You don't know --

MR. MILLAR: You don't know.

THE COURT: -- till you figure it out.

MR. MILLAR: But the Debtors -- the Debtors are the ones that above all want this company to come out with the best capital structure. You and they and we, frankly.

THE COURT: I got it. And I can't imagine that the Debtors wouldn't engage with you especially since I've sat here now and talked to you for 10 minutes. They're all smart, they'll read the room, because they don't want me to ask the next set of questions to their representative, so they'll absolutely engage. But you understand the concept of that.

MR. MILLAR: Sure. Absolutely.

THE COURT: Okay.

MR. MILLAR: You know, and my client is ready to engage. I mean, I'm the lawyer, but I have people at Citadel standing by.

THE COURT: Okay. So you have somebody not here, but you have somebody available by --

MR. MILLAR: Oh, yeah.

THE COURT: -- telephone or video?

MR. MILLAR: Yeah. Absolutely. And if you want him here, Your Honor, we'll bring him here.

THE COURT: I've reserved the right to supplement that answer over the course of the week. But I just don't know.

MR. MILLAR: Yeah.

THE COURT: I'm trying to understand, I mean, I -- you know, I'm, you know, doing what I do on a Sunday evening when I've 3,000 pages to read --

(Laughter.)

THE COURT: -- and I came across that, and I was just -- I'm trying to learn about it, and I'm trying to learn --

MR. MILLAR: Yeah.

THE COURT: -- that, you know, is it real, is it not real, is it problematic, are there things that can be tweaked about it? I'm just -- I'm trying to learn.

MR. MILLAR: Yeah. And like I said, I'll be here all week.

THE COURT: Okay.

MR. MILLAR: We'll work on that. We're excited about it, right, because we think we can do it, we're -- you know, it's not often frankly when somebody shows up and says -- I mean, this isn't like a term -- this is a commitment letter, this is like sign up, 350 million.

THE COURT: I know how to get people obligated.

MR. MILLAR: Yeah. So, Your Honor, you may be asking the question -- well, you asked the question of other parties and maybe it's obvious with me standing here, why do we care about the indemnity so much? And I'll tell you why we care, because if they, the company, ever has to pay out on

that indemnity, as they have said, and as we believe, that's going to be a Chapter 22.

THE COURT: At best.

MR. MILLAR: At best.

THE COURT: Yeah.

MR. MILLAR: And that means all the equity that we're getting goes to zero. And that's a bad result, and we want to have it dealt with here and now to the extent possible. And the other things is, you know, I've heard a little bit of commentary this morning about how in this bankruptcy we're dealing with litigation. And we are, right, I mean, they are, I'm not, in front of you, but Your Honor knows that the 5th Circuit took that appeal. They accepted that appeal and those are three appellate judges, I don't know what they're going to do.

THE COURT: Especially since I didn't give them a definition.

MR. MILLAR: Well, and since we're just talking here, you know, if you would have given them a definition, they would have probably found a way to say they had their own. Right? But, and, you know, 5th Circuit appellate justices I don't -- or judges, I don't mean to -- I'm not disparaging them, but they don't sit in these courtrooms and read financial documents all day.

THE COURT: But they're all way smarter than me. I

need --

MR. MILLAR: Well --

THE COURT: -- to put that on the Record.

(Laughter.)

MR. MILLAR: Yeah, I'm going to join you in knowing that they're smarter than me, as well, Your Honor.

So, look, I don't know what's going to happen there, and I care about that, my client cares about that, because let's say they show up and they say, "You know what? This side wins." They could do that. What if they certify that question to the New York Board of Appeals, who has a whole different set of issues concerning New York law.

THE COURT: Right.

MR. MILLAR: So, look, all I know is I care about the risk. And the one thing that I know is that if this plan is confirmed like this, then the Debtors bear that risk, and they don't need to. There has to be an alternative. So I'm here, and I know I show up on the objector side of the docket, but I'm here with a message, and I think I've conveyed it, that we're here looking for an alternative solution so that when this company emerges, it is not bound by this indemnity, it is free of that and it can go and actually do things like sell mattresses and be a profitable company, which we think is where it's going to end up.

So thank you, Your Honor. I think I've covered

everything I wanted.

THE COURT: So before you go --

MR. MILLAR: Yes.

THE COURT: -- number one, I appreciate the engagement and I appreciate the way that you've stuck yourself out there if you will. And I'm asking you -- I got it that you said, "Well, we're here, we're ready to listen," I'm asking you to go be the initiator.

MR. MILLAR: Absolutely. And I'll tell you my client has been reaching out to all kinds of people, so much so that -- well, I won't go there. He's been reaching out, he will continue to reach out, we will reach out to everybody in this courtroom that wants -- that will return our call.

Happy to do it.

THE COURT: All right.

MR. MILLAR: If anybody has a view as to how this exit financing could be better, send it over, we're ready to talk.

THE COURT: All right. Thank you.

MR. MILLAR: Thank you.

THE COURT: All right. Anyone else?

(No audible response.)

THE COURT: All right. So it's 11:55, who should I be talking to on the Debtor's side?

Mr. Lender, is that you?

MR. LENDER: Yes.

THE COURT: All right. It is 11:56. As I'm sure you've looked at the calendar, you know I have a relatively quick, hopefully quick *Party City* hearing at noon, so my thought is is that we adjourn now and then you tell me when you would like to start with your first witness.

And I mean, that whether it be 1:00 or 1:30 or 2:00, I want -- I don't know if there are things you need to prep for, things you need to change. Yeah, I will be done by 1:00, so just -- but if you need extra time, take extra time.

MR. LENDER: So it's 12:00, I think we can break, if it's okay with Your Honor, till 1:00 and we can do our lunch break between 12:00 and 1:00.

THE COURT: Does that -- anyone --

MR. LEONARD: If that works.

THE COURT: -- anyone have an issue with resuming at 1:00 o'clock Central?

UNIDENTIFIED SPEAKER: That'd be perfect, Your Honor.

THE COURT: All right. Terrific. Then thank you. And will someone please tell Mr. Shaw that he's -- that he's allowed to come back in the courtroom.

MR. LENDER: We'll take him to lunch.

(Laughter.)

THE COURT: All right. Then frankly, you can leave

everything right where it is unless you just feel compelled to -- I don't think anybody is going to attend. If I'm wrong, I'm wrong, I'll make sure they don't move your stuff. But I think everybody is just going to be on video. All right.

MR. LENDER: Thank you.

THE COURT: Thank you. We'll be adjourned.

(Proceedings concluded at 12:24 p.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability due to the condition of the electronic sound recording of the ZOOM/video/telephonic proceedings in the above-entitled matter.

/S./ MARY D. HENRY

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